Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARTHUR CALDERON, Warden, *Petitioner*,

v.

CHARLES EDWARD MOORE, JR., *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES EDWARD MOORE, JR.,	)	
Petitioner-Appellee-	)	Nos. 95-99009
Cross-Appellant,	)	95-99013
	)	
v.	)	D.C. No.
	)	CV-91-05976-KN
ARTHUR CALDERON, Warden,	)	
Respondent-Appellant-	)	OPINION
Cross-Appellee.	)	
	)	

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

Appeals from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

Argued and Submitted
January 16, 1997 -- Pasadena, California

Filed March 7, 1997

Before: Warren J. Ferguson,
Diarmuid F. O'Scannlain, and
Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge O'Scannlain;
Concurrence by Judge Ferguson

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether a writ of habeas corpus should issue when a state court denies a murder defendant's request to proceed pro se weeks before the trial begins.

I.

Charles Edward Moore, Jr. was charged with the double murder of Robert and Hattie Crumb. On July 22, 1983, the California Superior Court, where Moore's case was to be tried, appointed an attorney to represent Moore. The case was set for trial on March 5, 1984. On that date, the prosecutor and defense counsel appeared before the Master Calendar Court and asked for a continuance, which the court granted until March 9, 1984. Moore was not present in the courtroom. On March 9, the case was continued to March 16, 1984. Again, Moore was not present.

In a letter to the court dated March 10, 1984, Moore explained that, contrary to his requests, he had not been brought into the courtroom on the two previous trial dates, that he had doubts about his court-appointed lawyer, and that he wanted the court to "appoint me co counsel [sic] with another lawyer or allow me to go pro per, which is my constitutional right of 'self representation' under the Sixth Amendment." When he appeared before the Master Calendar Court on March 16, the court engaged in a lengthy discussion with Moore -- much of it out of the presence of the prosecution -- about his dissatisfaction with his lawyer and his desire to represent himself, to have co-counsel or advisory counsel appointed, or to have a second lawyer appointed. At the conclusion of the colloquy, the judge denied Moore's requests for co-counsel, advisory counsel, or a second lawyer, but did not rule on the self-representation request.

Moore appeared before the court again on March 19, and the judge again engaged Moore in a colloquy about his self-representation request. Moore stated that, in order to represent himself, he would need a continuance to prepare for trial. The prosecution explained that, although it had no objection to Moore's request, delaying the trial would impose a hardship on the prosecution and on the numerous out-of-state witnesses who had planned to be present for trial. The court then denied Moore's request to represent himself, stating that it would "interfere with the orderly administration of justice to continue his case" because a courtroom was waiting to begin Moore's trial. The court also noted that witnesses would be inconvenienced, and that Moore's attorney was ready to proceed.

The court transferred Moore's case to another courtroom for the disposition of other pending pretrial motions. Those motions occupied another week. The trial did not commence until March 26 -- over two weeks after Moore made his request to proceed pro se.

At the conclusion of the trial, the jury found Moore guilty of the murders of Robert and Hattie Crumb, and Moore was sentenced to death. The California Supreme Court affirmed the judgment on direct appeal, *People v. Moore*, 762 P.2d 1218 (Cal. 1988), and eventually denied a total of eight habeas petitions.

In 1991, Moore filed this habeas petition in the district court, presenting twenty-seven claims. After granting a stay of execution, the district court entertained a motion to dismiss some of Moore's claims for failure to exhaust, which it eventually denied. In 1993, the court noted that summary judgment might be appropriate on some of Moore's claims. Thus, in May 1994, Moore moved for summary judgment on three claim of his petition, and California cross-moved for summary judgment on other of Moore's claims. In 1995, the district court granted summary judgment in favor of Moore on two of his claims (involving his pre-trial and mid-trial requests to proceed pro se), and summarily adjudicated a number of other claims in favor of

California. On that basis, the court granted Moore's petition for the writ, ordering that Moore either be retried within 60 days or be released. California appealed from that decision, and Moore cross-appealed from the district court's denial of his other claims.

California promptly moved the district court for a stay pending appeal, which it denied. Our court, *Moore v. Calderon* 56 F.3d 39 (9th Cir. 1995), and Justice O'Connor in her capacity as Circuit Justice for the Ninth Circuit, *Calderon v. Moore*, No. A-910 (June 9, 1995) (unpublished order), denied subsequent requests for a stay pending appeal. Thereafter, California granted Moore a new trial, which prompted us to dismiss this case as moot. The Supreme Court reversed and remanded. *Calderon v. Moore*, ___U.S.___, 116 S.Ct. 2066 (1996). After we heard argument on the merits, the Supreme Court granted a stay pending disposition of these appeals. *Calderon v. Moore*, No. A-577 (February 20, 1997) (unpublished order). We now turn to the merits of these appeals.

II.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") worked substantial changes to the law of habeas corpus. Of specific relevance to this appeal are the changes to 28 U.S.C. § 2254(d), which now reads:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the Unite States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

California claims that the 1996 amendment should apply to this case, which was pending when the legislation was enacted.

Our court, sitting en banc, has ruled that the amendments do not apply to pending cases. *Jeffries v. Wood*, 103 F.3d 827 (9th Cir. 1996). The Supreme Court, however, has granted certiorari in a case which will be argued in the October 1996 Term to address this question. *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), cert. granted, 117 S.Ct. 726 (1997). Regardless of the resolution of the retroactivity issue, however, we are persuaded that, under either version of § 2254(d), Moore is entitled to the writ. *See Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996) (resolving merits under current and prior versions of § 2254); *Berryman v. Morton*, 100 F.3d 1089, 1104 (3d Cir. 1996) (same); *Ayala v. Speckard*, 89 F.3d 91, 96-97 (2d Cir. 1996) (same), *amended on other grounds*, 102 F.3d 649 (2d Cir. 1996).

III.

Under the old version of § 2254(d), we look, to the decisions of the Supreme Court and of this Court in deciding whether a writ should issue. In *Faretta v. California*, 422 U.S. 806 (1975), the Supreme Court held that the Sixth Amendment right to assistance of counsel included a right to represent oneself.[1/] Our court has since added a gloss to *Faretta* establishing a bright-line rule for the timeliness of *Faretta* requests: a request is timely if made before the jury is empaneled, unless it is shown to be a tactic to secure delay. *Savage v. Estelle*, 924 F.2d 1459, 1463 n.7 (9th Cir.), *cert. denied*, 501 U.S. 1255 (1991); *United States v. Smith*, 780 F.2d 810, 811 (9th Cir. 1986); *Armant v. Marquez*, 772 F.2d 552, 555-56 (9th Cir. 1985), *cert. denied*, 475 U.S. 1099 (1986); *Fritz v. Spalding*, 682 F.2d 782, 784 (9th Cir. 1982)

Under the old version of § 2254(d), these cases establishing a "jury empanelment" rule for timeliness compel our decision here. The jury was not empaneled when Moore made his request. Furthermore, the trial court made no finding that Moore's request was a tactic for delay, and the record does not suggest that it was such a tactic. Thus, under our case law, Moore's request was timely, and he is entitled to the writ.

California's argument that habeas relief is barred by *Teague v. Lane*, 489 U.S. 288 (1989), has no merit. "In *Teague*, the Court held that new constitutional rules of criminal procedure may not be applied retroactively to cases for which direct review had been completed prior to the decision creating the new rule." *Campbell v. Wood*, 18 F.3d 662, 676 (9th Cir. 1994). Although our "jury empanelment" rule for the timeliness of *Faretta* motions might have been a "new rule" when it was announced in 1982, *see Fritz*, 682 F.2d at 784; *Maxwell v. Sumner*, 673 F.2d 1031, 1036 (9th

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1. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

Cir.), *cert. denied*, 459 U.S. 976 (1982), it is not a new rule for Moore because it was announced *before* his conviction became final. (Indeed, it was announced before Moore was tried and convicted.) *Teague* does not bar relief for Moore.[2]

California also contends that the timeliness of a *Faretta* request is not a federal constitutional question, but rather a question of state procedural law. Since federal habeas relief must be based on a violation of federal law, California contends that the district court erred by issuing the writ when a state law question was involved. In at least two cases, however, we have granted the writ when a California court failed to follow the "jury empanelment" rule. *Armant*, 772 F.2d at 558; *Maxwell*, 673 F.2d at 1036. We could not have granted relief in those cases unless the timeliness of a *Faretta* request is a matter of federal constitutional law. We are bound by *Armant* and *Maxwell*, and reject California's argument.

IV.

Section 2254(d), as amended, prohibits issuing the writ unless the State court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state court decision may not be overturned on habeas review, for example, because of a conflict with Ninth Circuit-based law, but rather a writ may issue only when the state court decision is "contrary to, or involved an unreasonable of," an authoritative decision of the Supreme Court. *Childress v. Johnson*, ___F.3d___, 1997 WL 8836, *3-4 (5th Cir. 1997); *Devlin v. DeTella*, 101 F.3d 1206, 1208 (7th Cir. 1996); *see Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996).

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2. Moreover, as we decide below, Moore is entitled to relief on the basis of *Faretta* alone.

The only Supreme Court decision to discuss the timeliness of a request to proceed pro se is the *Faretta* decision itself. Our first inquiry is thus whether *Faretta* "clearly established" a rule of law regarding the timeliness of a request. In *Faretta*, the Court twice described the timing of Faretta's request to represent himself: it was made "weeks before trial," 422 U.S. at 835, and "well before the date of trial, *id.* at 807. The Court's acknowledgment of the timing of Faretta's request was neither a recitation of the background facts of the case nor *obiter dictum*; instead, it is mentioned not only in the opening paragraphs, but also in the very breath with which the Court announced its decision. *Id.* at 835. It is properly considered necessary to the Court's decision, and therefore is a holding of the Court. *See Export Group v. Reef Industries, Inc.*, 54 F.3d 1466, 1472 (9th Cir. 1995). As such, it is "clearly established Federal law, as determined by the Supreme Court of the United States."

If the state court decision in this case was "contrary to" the Federal law clearly established by *Faretta*, then the writ may properly be granted.[3/] Indeed, the relevant facts in this case are identical to those in *Faretta*. Like Faretta, Moore made his request "weeks before trial." It is undisputed that Moore's waiver of his right to counsel was knowing and intelligent. By failing to grant Moore's timely request, the trial court abridged Moore's right to self-representation under the Sixth Amendment. The writ of habeas corpus should issue.

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3. The timeliness of a *Faretta* request is a question of law. *Armant*, 772 F.2d at 556. Since the "contrary to" language governs questions of law, and the "unreasonable application of" language governs mixed questions of law, and fact, we apply only the "contrary to" language. *Accord Drinkard v. Johnson*, 97 F.3d 751, 767 (5th Cir. 1996); *Lindh v. Murphy*, 96 F.3d 856, 870 (7th Cir. 1996), *cert. granted*, 117 S.Ct. 726 (1997).

V.

Because we affirm the district court's issuance of the writ based on Moore's pretrial request to proceed pro se, we do not reach Moore's additional contentions. Except as ordered by the United States Supreme Court, the renewed motion currently pending before this court for a stay of the district court's order is DENIED as moot. The district court's decision granting the writ to Moore is AFFIRMED.

FERGUSON, Circuit Judge concurring.

I am please to concur in Judge O'Scannlain's concise and precise opinion.

I write only to explain that while courts of appeal have adopted a timely requirement to a *Faretta* motion, the Supreme Court did not make the constitutional right of self representation subject to any conditions except knowledge and intelligence.

The Court did not require that the right be exercised before trial. During the course of a trial, counsel may become incapable for many reasons -- injury, disbarment, misconduct. For any number of reasons a defendant in that instance may not want a mistrial -- he perceives that the trial has proceeded in his favor and doesn't want the prosecution to start all over again with rehabilitated witnesses. He may want to represent himself during the balance of the trial. *Faretta* grants him that right.

APPENDIX B

FILED MARCH 31, 1995

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHARLES EDWARD MOORE, JR.,
Petitioner,
v.

ARTHUR CALDERON, Warden,
Respondent.

_____/

INTRODUCTION

Having reviewed and considered the supporting and opposing papers, the relevant portions of the state record, and the other papers, pleadings, and records on file herein, for the reasons explained below, the Court *GRANTS* the petition.

RELEVANT FACTS AND PROCEDURAL POSTURE

The facts relevant to the underlying claims have been culled from the state court record and are addressed in the body of this memorandum decision. While the Attorney General contests summary judgment in favor of Moore, he does not suggest that any factual issues are in dispute,[1/] confining his argument to questions of law. Thus, although the parties disagree as to some of the inferences to be drawn, they do not dispute the underlying facts.

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1. There is, for example, no statement of genuine issues as requried by Local Rule 7.14.2.

Throughout the pleading stage, Moore repeatedly asserted that his petition included claims that could be resolved on summary judgment based on the current record and without any need for discovery. Respondent concedes that summary judgment is an appropriate method for disposing of these claims. *Blackledge v. Allison*, 431 U.S. 6-3, 80 (1977).[2/] His opposition is based solely on the contention that the claims, as pleaded, are insufficient as a matter of law and/or refuted by the state court record. He has disclaimed any intent to supplement the state court record.

While now moving for summary judgment, Moore has never disclaimed an intent to seek discovery and/or an evidentiary hearing to reinforce his factual contentions if this Court were to find that the state court record does not establish his claims as a matter of law. Moore has not been required to present all his evidence at this time; it would be inappropriate for this Court to pretermit briefing on the factual necessity of an evidentiary hearing. Contrary to Respondent's suggestion, the Court cannot summarily adjudicate factual issues adversely to Moore in this situation. *Starsky v. Williams*, 512 F.2d 109, 112 (9th Cit. 1975); *Hotel del Coronado Corp.* v. *Foodservice Equip. Distrib. Ass'n,* 783 F.2d 1323, 1325 n.l (9th Cir, 1986).[3/]

As to the claims that, as presented, raise pure questions of law, however, Moore should have been well aware that the Court has authority to, *sua sponte*, summarily adjudicate issues adversely to him. *Cool Fuel, Inc.* v.

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2. The Attorney General has filed a cross-motion for summary judgment. Since he set no hearing date or briefing schedule, the cross-motion has not required any opposition, Local Rule 7.4, and remains unbriefed.

3. The Attorney General alternatively suggests that the claims should be summarily dismissed. Not only has the time and stage for summary dismissal ended, Rule 4, Rules Governing Section 2254 Case, but such treatment would be plainly inappropriate in this case. *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990).

Conett, 685 F.2d 309, 311-12 (9th Cir. 1982); *Portsmouth Square. Inc.* v. *Shareholders Protective Comm.*, 770 F.2d 866, 869-70 (9th Cir. 1985).

ANALYSIS

I. Moore's Absence from the March 5 and March 9 Hearings Did Not Transgress Upon his Fifth or Sixth Amendment Rights

A. Retroactivity Concerns

More than a half-century ago, the United States Supreme Court affirmed that the due process clause protects a criminal defendant's right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder* v. *Massachusetts*, 291 U.S. 97, 105-06 (1934).

Invocation of this long-standing rule does not raise habeas retroactivity concerns. "The rule of constitutional criminal procedure" involved is not "new." *Cf. Teague* v. *Lane*, 489 U.S. 288 (1989) (plurality). Moore seeks only to have an old rule applied to a setting which has never before been directly confronted in a published decision -- a State's exclusion of a criminal defendant from a calendar call where defense counsel announces "ready for trial."

The mere fact that no published case has ever confronted this precise situation and held that the government's conduct violated constitutional norms does not establish that a holding in favor of Moore would be a "new rule of law." No more so, at least, than it could be said to establish that the State's actions here were so unconventional that they can be summarily condemned as contrary to "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder*, 291 U. S. at 105.

Teague makes no pretense of prohibiting the federal courts from applying well-established rules and precedent unless the ultimate result "is so novel that it forces a new rule." *Wright* v. *West*, 112 S.Ct. 2482, 2499 (1992) (Kennedy, J., concurring). The right to be present at "all critical stages of the proceedings" is just such a rule of general application. To accept Respondent's construction of *Teague* would improperly abdicate this Court's duty to review *de novo* questions of law and mixed questions of fact and law and virtually eviscerate habeas review. *Shiro* v. *Farley*, 114 S.Ct. 783, 790 (1994); *Cuyler* v. *Sullivan*, 446 U.S. 335, 342 (1980).

B. Application of Moore's Right to be Present

The right to be present extends to all "critical stages of the proceedings." As more recently explained in *Kentucky* v. *Stincer*, 482 U.S 730 (1987), which, it is noted parenthetically, was also decided before Moore's judgment became final:

> Although the Court has emphasized that this privilege of presence is not guaranteed "when presence would be useless, or the benefit but a mere shadow," due process clearly requires that a defendant be allowed to be present "to the extent that a fair and just hearing would be thwarted by his absence." Thus, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.

Stincer, 482 U.S. at 745 (internal citations omitted) (quoting *Snyder*, 291 U.S. at 106-07, 108).

Judicial analysis has "emphasize[d] . . . the particular nature of the . . . hearing" at issue, paying close attention to the potential benefit to the defendant that could be gained by his personal presence. *Stincer*, 482 U.S. at

745; *Rice v. Wood*, 44 F.3d 1396, 1401-02 (9th Cir. 1995). In *United States v. Gagnon*, 470 U.S. 522 (1985), for example, the Court was heavily influenced by the fact that the criminal defendants "could have done nothing had they been at the conference, nor would they have gained anything by attending." *Id.*, 470 U.S. at 527.[4]

Moore argues that "a fair and just hearing . . . [was] thwarted by his absence" from the calendar calls when Slick announced "ready."[5] He argues that his presence was necessary to enable him, to make his motion for self-representation at one of those conferences -- a time, according to him when the trial court would have recognized its obligation to grant his request.

The defect with this argument is in its perspective. Moore approaches the issue with *post hoc* omniscience. Whether the defendant has a right to be present at a particular proceeding significantly depends upon "the particular nature of the . . . hearing" and the benefits that could be gained by the defendants participation. Shifting the focus to a retrospective inquiry of what might have transpired in light of subsequent events, if the defendant had been present earlier, deprives judges, prosecutors, and defense attorneys of knowing whether they are required to have the defendant in court before they can proceed. Adopting Moore's analysis would effectively mandate that defendants be present at every possible stage of the proceedings, even those which they voluntarily choose not to

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4. *Accord Snyder*, 291 U.S. at 108; *United States* v. *Veatch*, 674 F.2 1217, 1226 (9th Cir. 1981), *cert. denied*, 456 U.S. 946 (1982); *Bustamante* v. *Eyman*, 456 F.2d 269, 274-75 (9th Cir. 1972); *Sturqis* v. *Goldsmith*, 796 F.2d 1103, 1109 (9th Cir. 1986). Cf. Rice, 44 F.3d at 1401-02.

5. Slick did not announce on the record that he was ready for trial at either the March 5 or March 9 conference. That he did so off the record and did not need additional preparation time, however, can be inferred from the fact that he did not ask for a continuance beyond the few days requested by the prosecution.

attend, irrespective of the significance or importance of the individual proceeding itself.

Moore's approach overlooks the distinctions drawn by the other cases. Every hearing would be a "critical stage" because every hearing would be an opportunity where, had the defendants been so disposed, they could have requested self-representation. Under Moore's analysis, even *Stincer*, for example, would have been decided differently because, although Stincer never did request self-representation, he might have done so at that time.

Moore insinuates that it is Kafkaesque to find that he was properly excluded from the calendar calls while simultaneously holding that his self-representation motion was too late because it should have been presented at the calendar call. The harm here, however, arose not because Moore was absent from the calendar calls on March 5 and March 9, but because the master calendar court failed to respect the fact that Moore's motion was being made at his first opportunity to address the court after the upheaval in the relationship with his attorney.

II. The Record Does not Conclusively Establish that the Trial Court Improperly Denied Moore's Motion to Substitute Counsel

"The denial of a motion to substitute counsel implicates the defendant's Sixth Amendment right to counsel and thus is properly considered in [a] habeas proceeding." *Bland* v. *California Dep't of Corrections*, 20 F.3d 1469, 1475 (9th Cir.), *cert. denied*, 115 S.Ct. 357 (1994). As explained a quarter-century ago in *Brown* v. *Craven*, 424 F.2d 1166 (9th Cir. 1970), "to compel one charged with grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever." *Brown*, 424 F.2d at 1170; *accord Hudson* v. *Rushen*, 686 F.2d 826, 829 (9th Cir. 1982), *cert. denied*, 461 U.S. 916 (1983).

The trial court's ruling, however, will only be set aside for an abuse of discretion. As the Ninth Circuit explained:

> When reviewing the denial of a motion to substitute counsel for abuse of discretion, we consider the following three factors: "(1) timeliness of the motion; (2) adequacy of the court's inquiry into the defendant's complaint; and (3) whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense."

Bland, 20 F.3d at 1475 (quoting *United States* v. *Walker*, 915 F.2d 480, 482 (9th Cir. 1990)).

The parties agree that the motion was not denied as untimely and, therefore, that the timeliness of the motion is not an issue on habeas review. *Bland*, 20 F.3d at 1476; *cf. Walker*, 915 F.2d at 482. The parties' disputes focus on the other two factors - whether the trial court's inquiry was adequate and whether, on its face, the record establishes a conflict so great that substitution of counsel was required.

A. Adequacy of the Trial Court's Inquiry

"When a defendant indicates dissatisfaction with his counsel, the trial court ordinarily must conduct a thorough inquiry in order to discover whether the situation is depriving the defendant of an adequate defense." *King* v. *Rowland*, 977 F.2d 1354, 1357 (9th Cir. 1992); *accord United States* v. *Robinson*, 913 F.2d 712, 716 (9th Cir. 1990), *cert. denied*, 498 U.S. 1104 (1991). Although thorough, the inquiry need not be exhaustive; it "need only be 'as comprehensive as the circumstances reasonably would permit."' *King*, 977 F.2d at 1357 (quoting *Hudson*, 686 F.2d at 831).[6/]

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6. Whatever the constitutional minimum might be, the Ninth

In light of *Hudson* and *McClendon*, it is clear that the master calendar judge's inquiry was more than sufficient. True, unlike *McClendon* and *Hudson*, the master calendar judge was not intimately familiar with the case. He accommodated for this, however, by asking a broad range of questions, soliciting further complaints until Moore said that he had no others.[7] Whatever may be said about the court's assessment of the facts, the court cannot be criticized as not having been adequately informed.

Since, as the court acknowledged, it knew little about the facts and circumstances of the case, it had an obligation to ferret out the information to enable it to make a reasoned analysis of the extent of the conflict. *Cf. Hudson*, 686 F.2d at 831. It clearly did so. The court questioned Moore about every complaint and frequently asked Slick to explain his actions. The court did not stop asking Moore about his complaints until Moore himself said that he had expressed all the complaints that he had. The canvass undertaken here is a far cry from the summary rejections involved in *Bland*, *Brown*, and *Torres-Rodriguez*. Moore identifies nothing concrete about which the master calendar judge failed to inquire. On the basis of the current record, the inquiry was constitutionally sufficient.[8]

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has clearly rejected the possibility that such a motion may be denied without any inquiry. In every instance where the motion was met with a summary rejection, the Ninth Circuit has summarily reversed. *E.g. Bland*, 20 F 3d at 1475; *United States* v. *Torres-Rodriguez*, 930 F.Zd 1375, 1381 (9th Cir. 1991); *Walker*, 915 F.2d at 483; *Brown*, 424 F.2d at 1170. Beyond rejecting the possibility that such motions can be summarily denied, however, the Ninth Circuit has not definitively established any minimum level of discussion. *E.g. Hudson*, 686 F.2d at 828 & n.1, 831; *United States* v. *McClendon*, 782 F.2d 785, 789 (9th Cir. 1986).

7. Further, while no substitute for further inquiry, the judge undoubtedly benefitted from Moore's letter that briefly outlined the substance of his complaints. *Cf. Walker*, 915 F.2d at 482.

8. The Attorney General argues that the state appellate court's

Moreover, the adequacy of the trial court's inquiry is not the type of claim for which the record can be supplemented prior to being resolved. Rather, like sufficiency of the evidence, the trial court's inquiry was either adequate or it was not. Any comments in the way of further or additional questions will be received by way of argument. *Dallas* v. *Arave*, 984 F.2d 292, 296 (9th Cir. 1993). By way of these summary judgment proceedings, Moore has had a full opportunity to present his arguments regarding the trial court's inquiry on his motion for substitution of counsel. These arguments are unpersuasive. The court not only denies Moore's motion for summary judgment on this aspect of the claim, but also *sua sponte* summarily adjudicates this issue adversely to Moore.

B. Extent of the Conflict

In only limited situations will substitution of counsel be constitutionally required. As the Supreme Court has made clear, the Sixth Amendment right to counsel does not encompass a right to develop a "meaningful relationship" with one's attorney. *Morris* v. *Slappy*, 461 U.S. 1, 14 (1983). Nonetheless, the quality of the relationship is not wholly outside the scope of the Sixth Amendment's concerns. As quoted above, the Ninth Circuit long ago confirmed that the constitutional right to assistance of counsel is effectively denied when a defendant is forced into trial while represented by a lawyer with whom he "has become embroiled in irreconcilable conflict." *Brown*, 424

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approval of the trial court's inquiry is a question of fact entitled to the presumption of correctness. This borders on frivolous. *Cf.* 28 U.S.C. § 2254 (d). What the trial court did and did not ask are the type of "basic, primary, or historical" facts entitled to the presumption. *Cuyler*, 446 U S at 342. Whether the trial court's inquiry was "adequate" is a mixed question of fact and law, reviewed *de novo*. *Sumner* v. *Mata*, 455 U.S. 591, 597 (1982).

F.2d at 1170; *accord Hudson*, 686 F.2d at 829; *Frazer* v. *United* F.3d 778, 783-84 (9th Cir. 1994).

The threshold for establishing "irreconcilable conflict," however, is quite high. In order to establish that substitution of counsel is necessary, the defendant must demonstrate either that there was a legal conflict of interest, e.g. *United States* v. *Rewald*, 889 F.2d 836, 858 (9th Cir. 1989), *amended*, 902 F.2d 18, *cert. denied*, 498 U.S 819 (1990), or that the "'[personal] conflict . . . was so great that it resulted in a total lack of communication preventing an adequate defense.'" *Bland*, 20 F.3d at 1475 (quoting *Walker*, 915 F.2d at 482).

Moore does not claim that his relationship with Slick was burdened by a conflict of interest. Rather, he complains that his relationship had deteriorated to the point where substitution of counsel was constitutionally required. As such, he must satisfy the stringent standard employed by the Ninth Circuit. On this record, Moore has failed to do so.

From a review of the record, it appears that Moore had three basic complaints about Slick. First, Moore complained about his lack of communication with Slick. Second, Moore feared that Slick had not adequately prepared for the trial. Finally, Moore complained that he had lost all trust in Slick, primarily as a result of Slick's having abandoned him in the holding cell during the March 5 and March 9 status conferences. Moore does not now claim that there were any other disputes with Slick or his performance that were not identified at the March 16 hearing.

1. Adequacy ofCommunication[9/]

As to the sufficiency of Slick's and Moore's communication, the trial court certainly could have more thoroughly investigated the underlying facts. Because of the limited inquiry, the underlying facts are unclear and, as a result, this Court's review is "somewhat hampered." *Bland*, 20 F.3d at 1477.

The trial court was presented with two different visions of the communications that had taken place between Moore and Slick. Moore initially complained that Slick "didn't really explain to me the defense he plans to organize on my behalf." Although the judge expressed reluctance about inquiring into the substance of the conversations, he did ask Slick whether the conclusion was accurate. Slick responded that he had "told him what I think will fly. And I -- what I think won't fly."

While the master calendar judge was apparently satisfied with this responses, Moore clearly was not. When asked whether Slick's explanation was accurate, Moore clarified that Slick had only talked to him "about one part of Terry Avery's statement, and that was all. . . . [¶] About how many times she was supposed to have stabbed [] the victim; and that's it. That's all we've talked about." Slick did not demur to this as untrue. Nor did the court solicit a response to Moore's explanation. Whether Slick was referring to Avery's prior statement about the knife when he said what "would fly" is unknown. Because the trial judge

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9. This complaint cannot be so glibly dismissed as a whimpering demand for "more" communication simply because Moore had "some" communication with slick. Indeed, if it could be, no absence of communication could ever be sufficiently severe. Any defendant complaining of a "total lack of communication" is probably seeking "more." Many a defendant entitled to substitution of counsel may well have had "some" communication. Finally, the Attorney General suggests no guidance for its rhetorical "' some' communication" standard.

failed to address this complaint when ruling on the motion, his factual findings are also unclear.

Moore also complained that not only was he left in the dark as to the proposed defense strategy, but also as to the theories behind the motions that were filed. When the court informed Moore that Slick had filed a motion to dismiss and a motion to suppress evidence, Moore clarified "I understand that. But I wanted him -- to discuss those motions with him and find out what was in the motions and what he's planning to argue." Moore added that he had a suppression theory of his own and, when discussing it with Slick, Slick was reluctant to include it.

Slick confirmed that he and Moore had discussed Moore's additional theory for suppression and expressed to Moore his belief that the theory was not viable. Slick stated that he had nonetheless included the theory in the papers that were eventually filed. Slick, however, neither confirmed nor denied that he had failed to discuss the motion to dismiss that he had prepared. Nor did Slick deny refusing to discuss his own theories for the suppression motion. Again, the judge did not attempt to clarify this ambiguity nor did he address it when ruling on the motion.

The trial court never indicated what standard it was applying. Nor did it make any finding as to the amount or substance of the communication. Inasmuch as the state courts apparently find little cause for complaint over capital defense counsel whose "only significant interview with [the defendant] was at the courthouse on the morning of trial," *People* v. *Mayfield*, 5 Cal. 4th 142, 201, 19 Cal. Rptr.2d 836 (1993), after having spent "only a total of 40 hours preparing for both the guilt and penalty phases of the trial," *id.*, at 210 (Kennard, J, concurring and dissenting), it would be sheer speculation to assume that the trial court discredited Moore's factual allegations -- especially when they were not refuted by Slick.

Whatever his findings of fact were, the judge must have considered the amount of communication to be sufficient. Yet, this conclusion cannot be assessed -- even

for an abuse of discretion -- absent an understanding of the underlying facts. It is not at all clear that the master calendar judge disbelieved Moore's description of events. And, as described by Moore, the amount of communication was marginal at best. Even as described by Slick, however, this Court cannot make a definitive ruling. Slick did not deny Moore's description of the events. All Slick stated, in essence, was a formulaic conclusion that he believed the conferences were adequate and, to Moore's dismay, disappointingly candid as well.

Insofar as Moore is complaining about the his "infrequency of meetings with his attorney than about his reluctance to communicate with counsel," *United States* v. *Mills*, 597 F.2d 693, 700 (9th Cir. 1979), the record does not conclusively establish that this problem amounted to an "irreconcilable conflict" or "total lack of communication" of the sort that would require a change of counsel. It remains, however, a factor to be considered in reviewing Moore's other concerns.

2. Slick's Degree of Preparation

Moore identified several specific facts which led him to question Slick's preparation for trial. First, during his meeting with Slick on the day that Slick proposed declaring ready for trial, Slick apparently failed to recognize the name of a witness, James Jones, whom Moore had specifically asked Slick to interview. Second, during that same meeting, Slick allegedly displayed an inadequate familiarity with the specific facts of the case and the record, including documented inconsistencies in the anticipated testimony of the prosecution's key witness. Third, Moore believed that during the previous, long-term continuances, Slick did not have an opportunity to prepare for Moore's trial because he was busy representing other clients.

As to the dispute regarding witness Jones, the trial court's findings must have been consistent with the undisputed facts. Slick's initial unwillingness to interview

Mr. Jones was not a basis for substitution of counsel because, by the time of the hearing, Slick had already committed himself to interviewing Mr. Jones.

The next aspect of Moore's complaint was that Slick was not sufficiently familiar with the witnesses and facts in his case. In the absence of any disagreement by Moore, the master calendar judge must have credited Slick's explanation that he had reviewed the record, compiled notes, and that Moore's discomfort arose from Slick's inability to respond to all the questions without referring to his notes. An attorney can be adequately prepared without having committed to memory every detail in the evidence.

The last aspect of Moore's concern over Slick's efforts was the ultimate question of whether Slick had actually expended substantial time preparing the case for trial. The trial court's explanation in denying the motion -- "Well, the Court is going to find, based on this record, that Mr. Slick has adequately prepared this case." -- obviously reflects an adoption of Slick's uncontroverted explanation as to his efforts. While the adequacy of Slick's preparation may be open to federal review, *Sumner*, 455 U.S. at 597, the trial court's underlying findings are undeniably factual in nature and, therefore, presumed correct unless proven otherwise. 28 U.S.C. S 2254(d). The trial court plainly concluded that Slick had in fact read and reviewed the transcripts, police reports, jail records, and had spent far more time preparing than Moore feared was the case. These conclusions have fair support in the record. Moore gives no reason why the presumption of correctness does not attach to these findings.

Reviewing the record in the light most favorable to the party opposing summary judgment, the Court cannot find that the record conclusively demonstrates that Slick would have been inadequately prepared by the time trial was expected to commence. The master calendar court adopted Slick's explanations and had no discomfort with the absence of any intention on Slick's part to locate and interview Mr. Jones prior to trial. *Cf. Walker*, 915 F,2d at 483-85.

Insofar as Slick's preparation is concerned the face of the record does not establish that substitution of counsel was constitutionally required as a matter of law.

3. Moore's General Distrust

Probably the most significant problem with the relationship -- and the one most difficult to objectively quantify -- was Moore's general distrust of and discomfort with Slick. The tangible aspects of this complaint had two primary facets. First, irrespective of the trial judge's conclusion that Slick's investigative efforts were consistent with the constitutional minimum, Moore nonetheless had a strong personal belief -- which belief was not objectively unreasonable -- that Slick was not exerting his best efforts. Moreover, Slick's meetings with Moore were not sufficiently frequent or sufficiently detailed to put Moore's mind at ease. The second aspect arose out of Slick's having effectively abandoned Moore in the holding cell on March 5 and 9 after Moore expressed an interest in representing himself.

A defendant "justifiably expects that a lawyer will use every skill, expend every energy, and tap every legitimate resource in the exercise of independent professional judgment on behalf of the client." *Rewald*, 889 F 2d at 858; *accord Frazer*, 18 F.3d at 785. As discussed in the proceeding section, Slick's failure to have interviewed Mr. Jones earlier was not a basis for concluding that he would not be ready for trial. In light of Slick's apparently strong reluctance to interview Mr. Jones at all, however, Moore may have been justified in questioning Slick's dedication to Moore's defense.

While the trial court judge purported to concur in Slick's assessment of the futility in contacting Mr. Jones -- stating "common sense tells me that Mr. Jones isn't going to help you very much" -- he had no factual basis for doing so. The judge served in the master calendar department and nothing in the record indicates that he had any knowledge of the facts or witnesses in the case. Indeed, only moments

before the instant colloquy, while attempting to impress upon Moore the benefits of representation by counsel, the judge confirmed he was only speaking in general terms because "I know nothing about this case. I'm not going to try this case." The only possible basis for the judge's conclusion was that Mr. Jones was going to be called as a witness by the prosecution. This, however, would prove to be an erroneous assumption.

As Moore recognized, Mr. Jones was a potentially important defense witness. Jones was the person who opened the security door to the building, allegedly enabling Avery, Harris, and Moore to enter the complex. Moore knew Jones. He also knew that Jones knew him and would have recognized him. Moore anticipated (correctly) that Jones would testify (as he had in the separate trial of co-defendant Harris) that he, Jones, did not see Moore at the apartment complex on the night of the killings and that he would have recognized Moore if he had seen Moore. *People* v. *Moore*, 47 Cal.3d 63, 83-84, 252 Cal.Rptr. 494 (1988), *cert. denied*, 490 U.S. 1095 (1989). Under these circumstances, it was entirely reasonable for Moore to want to have Slick meet with Jones and confirm the extent to which Jones could be used to prove that Moore was not present on the night of the murders.[10/]

While the record suggests that Moore was expressing genuine concerns about Slick's efforts and while those concerns may have been objectively reasonable, when

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10. This particular complaint is similar to the situation presented in *Walker*, 915 F.2d 480. The *Walker* defendant complained that his attorney had failed to contact several witnesses who would have corroborated his claim of mistaken identity and who could have provided information suggesting that the defendant's roommate was the actual culprit. As in *Walker*, Moore's "lack of confidence in his attorney arose out of a disagreement over trial preparation and potential witnesses, rather than any general unreasonableness or manufactured discontent." *Walker*, 915 F 2d at 484. Contrary to the trial court's assertion, no matter whose interpretation is believed, Moore was justifiably concerned about having Jones interviewed.

reviewed in the light most favorable to the party opposing summary judgment, the record does not conclusively establish that substitution of counsel was the only constitutionally permissible remedy.

The instances in which substitution of counsel will be constitutionally required based on the defendant's personal misgivings about counsel will be extremely rare. First, unlike defendants with monetary resources, "[t]he law does not permit [indigent defendants] to obtain the appointed counsel of their] choice." *United States* v. *Ono*, 997 F.2d 647, 651 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 738 (1994); *compare United States* v. *Lillie*, 989 F.2d 1054, 1055 (9th Cir. 1993). Second, indigent defendants cannot force the substitution of appointed counsel by unilaterally refusing to cooperate with their attorneys absent some cognizable or legitimate reason for doing so. *Morris*, 461 U.S. at 13.[11/] Third, indigent defendants cannot manufacture a need for new counsel simply by failing to develop a "meaningful attorney-client relationship." *Id.*

To render substitution of counsel the only constitutionally permissible path, the attorney and client must have become embroiled in an irreconcilable conflict -- resulting in either a "personal conflict that affected his communication with counsel," *Castro*, 972 F 2d at 1110, some other "breakdown in communication" between the defendant and his lawyer, *Roston*, 986 F.2d at 1292, an impediment to the "present[ation of] an adequate defense," *Walker*, 915 F.2d at 485, or a "serious obstacle to effective representation," *Ono*, 997 F.2d at 651 -- which was not attributable to the defendant's petulance or lack of good faith.

A review of the many cases in which the Ninth Circuit and Supreme Court have passed on the severity of attorney-client disputes confirms that, while not ideal,

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11. *Accord United States* v. *Roston*, 986 F.2d 1287, 1292-93 (9th Cir.), *cert. denied*, 114 S.Ct. 206 (1993); *King*, 977 F.2d at 1357; *Hudson*, 686 F.2d at 831. *Cf. Frazer*, 18 F.3d at 784.

Moore's relationship with Slick was not constitutionally intolerable. *Cf. Morris*, 461 U.S. at 13-14; *Frazer*, 18 F.3d at 783; *Walker*, 915 F.2d at 484.[12/]

Moore's motion for summary judgment on the claim that the master calendar judge violated Moore's constitutional rights when it refused to order a substitution of counsel is DENIED. Since the Court has neither asked for nor received briefing on what evidence outside the record exists or would be admissible, the court does not enter a final order on the merits of this claim.

III. The Request for Co-Counsel Status

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12. Here, unlike *Walker*, not only was the trial judge's inquiry more than adequate, but Moore did in fact have ongoing discussions with his attorney. Whether those conversations were "meaningful" -- i.e., more than idle pleasantries or vulgarities -- was not thoroughly analyzed by the trial judge, but was inquired into at least briefly. The trial judge obviously determined that the discussions were sufficient and, while that conclusion is not irrefutably compelled by the record, neither is it incontrovertibly refuted. Whether treated as a finding of historical fact or a mixed question of fact in context of the legal rule to be applied, the trial judge's finding is not so attenuated that it can be set aside without an evidentiary hearing.

Similar to, but not as severe as, *Walker*, Moore had substantial reason to be concerned about Slick's preparation in light of Slick's failure to contact a relevant witness that Moore had previously identified to him. Similar to -- but nowhere near as severe as -- *Frazer*, Moore had to suffer through his attorney's imperious eruption and actual abandonment when Moore voiced a desire to assert his constitutional rights. Slick's desertion of Moore in the holding cell -- twice -- was surely sufficient to dislodge whatever trust that had been cultivated

Nonetheless, despite the existence of these legitimate disputes, even accepting that Moore neither trusted nor had faith in Slick, the record does not conclusively establish that these conflicts effected a total breakdown in his communication with Slick. The record does not establish that Moore was unable to communicate with Slick regarding significant, case-related matters Cf. *Walker*, 915 F.2d at 484. Nor does the record establish "that the alleged conflict was so great that it prevented [Moore] from presenting an adequate defense." *Id.*, *McClendon*, 782 F.2d at 789.

Moore's letter also requested that the master calendar judge "appoint me co-council (sic) with another lawyer." When the master calendar judge asked what Moore meant by "co-counsel," Moore explained that he wanted "to be in a position in order to, you know, ask the [] [the lawyers] about things and tell them, you know, make sure they do the things I ask them to do."

Although a hearing on the self-representation motion had already been postponed until the following Monday, the court responded that it appeared that Moore was asking for "stand-by" counsel and that such assistance was not necessary "because you are not pro per, you see?" When Moore confirmed that he wanted permission to proceed *pro se*, the court reaffirmed that the *pro se* request would not be considered until a later date.

A. Cognizability

Respondent's cognizability argument is premised on the assumption that Moore does not have a federal constitutional right to serve as co-counsel. Since no federal rights were violated, the argument continues, his claim must be based on an alleged violation of state law which, of course, is not cognizable on federal habeas. E.g. *Estelle* v. *McGuire*, 502 U.S. 62, 61 (1991); *cf. Hicks* v. *Oklahoma*, 447 U.S. 343 (1980).

The defect in the argument -- besides being tautological -- is that it erroneously equates a failure on the merits with a lack of jurisdiction. *Bell* v. *Hood*, 327 U.S. 678, 682 (1946). Moore *asserts* that he has a right, guaranteed by the federal constitution, to serve as co-counsel and that this federal right was infringed by the state courts. Whether the state court's rulings in fact violated the federal constitution, as Moore argues, is an appropriate inquiry on federal habeas review.

B. *Teague* Retroactivity

The Attorney General next argues that the claim must be denied because, to vindicate these asserted constitutional rights would amount to creating a new rule of constitutional criminal procedure during federal habeas review. The bane of this argument is that it is necessary to review the underlying merits in order to determine whether there was in fact such a constitutional right in existence.[13/]

1. Refusal to Permit Hybrid Representation

Notwithstanding Moore's clear request for co-counsel status -- i.e., to be represented by counsel but in a position to exercise control over the lawyer's efforts -- the master calendar judge treated the motion as one seeking appointment of advisory counsel. The Ninth Circuit has noted a distinction between "co-counsel" and "stand-by," or "advisory," counsel. Distinguishing between the forms of representation, the circuit observed:

> [C]o-counsel and advisory counsel are terms that have gained distinct meanings. Advisory counsel is generally used to describe the situation when a *pro se* defendant is given technical assistance by an attorney in the courtroom, but the attorney does not participate in the actual conduct of the trial. In the co-counsel situation, the attorney may participate directly in the trial proceedings with the defendant (examining witnesses, objecting to evidence, etc.).

Locks v. *Sumner*, 703 F.2d 403, 407 (9th Cir.), *cert. denied*, 464 U.S. 933 (1983).

Although drawing a distinction between the forms, the circuit refused to recognize a difference in their constitutional stature. The circuit has ruled that neither type

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13. Moore does not contend that he had any state law right, which would have been protected by the due process clause, to either co-counsel status or to appointment of stand-by counsel. *Cf. Hicks*, 447 U.S. 343.

rises to the level of constitutional importance. *See United States* v. *Halbert*, 640 F.2d 1000 (9th Cir. 1981) (no right to co-counsel status); *Locks*, 703 F.2d at 408 (no right to advisory counsel).

2. Application of Retroactivity Doctrine

Under Teague, a federal court may not announce or enforce "new rules of constitutional criminal procedure" during habeas proceedings. *Teague*, 489 U.S. at 310. Under *Halbert*, Moore had no constitutional right to co-counsel status. Moore fails to explain why faulting the trial court for having denied him cocounsel status would not amount to creating a new rule of constitutional criminal procedure within the meaning of *Teague*.

Similarly, under *Locks*, Moore had no federal right to advisory counsel either. Moore is correct that the master calendar judge erred in denying stand-by counsel on the basis that Moore was not *pro se* after having expressly postponed a hearing on the *pro se* request. Nonetheless, Moore cannot complain of the error since he has no right to stand-by counsel. As such, vindication of this claim would require the habeas court to fashion a "new rule of constitutional criminal procedure" in contravention of *Teague*.

IV. Denial of Motion for Second Counsel

Moore does not argue that the federal constitution independently guarantees him a right to be represented by two attorneys. Rather, he asserts that the State extended this right to him and the due process clause prohibits the State from arbitrarily taking it away.

Approximately two years before the events at issue, in *Keenan* v. *Superior Court*, 31 Cal. 3d 424, 180 Cal. Rptr. 489, *appeal dismissed*, 459 U.S. 937 (1982), the California Supreme Court decided that a series of California statutes entitled capitally-charged defendants to representation by more than one attorney if the circumstances so required:

> [Trial courts have] ample authority for appointment of an additional attorney shown to be necessary for defense of a capital case . . . The appointment is not an absolute right, however, and the decision as to whether an additional attorney should be appointed remains within the sound discretion of the trial court. . . That discretion, of course, must be guided by legal principles and policies appropriate to the particular matter at issue.

Keenan, 31 Cal.3d at 430.

Two years later, in this case, during the canvass on Moore's satisfaction with Slick, Moore requested appointment of a second attorney. The trial court, however, rejected this out of hand:

> THE DEFENDANT: Okay. And I was informed, too, that because of the fact that I have a special circumstances (sic), that I could have two representatives represent me in this case. Is that correct?
>
> THE COURT: No, I never heard of that. I never heard of that. Two representatives? You mean two lawyers?

Moore retraced his steps somewhat and said he would be satisfied with any two representatives, including himself serving as co-counsel. On direct appeal, the California Supreme Court ruled that the trial court carefully considered the request and "exercised proper discretion in denying defendant's *Keenan* motion." *Moore*, 47 Cal.3d at 76.

A. The Claim is Cognizable on Federal Habeas

What the Attorney General fails to recognize in its cognizability argument is that Moore is not seeking purely a vindication of state law. *Cf. Estelle*, 502 U.S. at 67. Rather, Moore here claims that he has a due process interest in the state's extension of the procedural guarantees that it accords to all its other capital defendants.

The Ninth Circuit and Supreme Court have both recognized that while the states may not be impelled to adopt any particular mode of procedure, "the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state." *Fetterly v. Paskett,* 997 F.2d 1295, 1300 (9th Cir. 1993), *cert. denied*, 115 S.Ct. 290 (1994).[14/] Given the obvious importance of "the guiding hand of counsel" as "one of the safeguards . . . deemed necessary to insure fundamental human rights of life and liberty," *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932), *Johnson* v. *Zerbst*, 304 U.S. 458, 462 (1938) -- and especially the heightened importance of counsel in capital cases -- California's statutory guarantee of a provisional right to second counsel in capital cases is precisely the type of procedural right that is protected from arbitrary deprivation by the due process clause. The Attorney General has failed to suggest any reason why the court should conclude otherwise. The claim is, therefore, cognizable on federal habeas. *Fetterly*, 997 F.2d at 1300, *Campbell*, 997 F.2d at 522.

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14. As explained by another recent Ninth Circuit panel, "*Hicks* v. [*Oklahoma*, 447 U.S. 343 (1980)] recognized that state laws which guarantee a criminal defendant procedural rights . . . . even if not themselves constitutionally required, may give rise to liberty interests protected against arbitrary deprivation by the Fourteenth Amendment's Due Process Clause." *Campbell* v. *Blodgett*, 997 F.2d 512, 522 (9th Cir. 1992), *cert. denied*, 114 S.Ct. 1337 (1994).

B. The Trial Court Arbitrarily Deprived Moore of His Qualified Right to Assistance of Second Counsel

As noted above, in response to Moore's request for second counsel, the master calendar judge unambiguously rejected the possibility of appointing second counsel as unsupported by any legal authority. The judge did not consider any of the "legal principles and policies, appropriate to the particular matter at issue." *Keenan*, 31 Cal. 3d at 430. The judge did not exercise any discretion; rather, the court simply rejected the claim as unprecedented: "No, I never heard of that."

As pithily characterized by Justice O'Connor, "It is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law." *Schlup* v. *Delo*, 115 S. Ct. 851, (1995) (O'Connor, J., concurring). This is not, of course, simply the view of a single justice, but rather reflective of a long tradition in the common law. *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990).[15]

C. In the Unique Circumstances of this Case, the Trial Court's Error was Harmless

Even though the master calendar judge abruptly terminated any discussion on the need for additional counsel by summarily concluding that the request was without legal authority, because Moore also had other motions on calendar relating to counsel's performance, the record adequately documents the basis for Moore's request for additional counsel. Because these reasons were insufficient to justify appointment of second counsel, this Court can confidently

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15. *Accord Campbell*, 997 F.2d at 516 ("A court abuses its discretion when it bases its decision on an erroneous legal conclusion."), *Petition of Hill*, 775 F.2d 1037, 1040 (9th Cir. 1985) ("There is an abuse of discretion when a judge's decision is based on an erroneous conclusion of law.").

conclude that, irrespective of the master calendar judge's unfamiliarity with the authority provided by *Keenan*, second counsel would not have been authorized.

In describing the contours of the authority for appointing second counsel, the state supreme court in *Keenan* noted several factors that would always weigh heavily in considering a request for additional counsel, including the need, heightened in a capital case, "to provide a complete and full defense" coupled with the "importance . . . [of] pretrial preparation in providing a criminal defendant effective legal assistance." *Id.*, at 431. While vesting the trial courts with discretion to rule on individual requests, the state supreme court explained:

> If it appears that a second attorney may lend important assistance in preparing for trial or presenting the case, the court should rule favorably on the request. Indeed, in general, under a showing of genuine need, and certainly in circumstances as pervasive as those offered by the attorney in this case, a presumption arises that a second attorney is required.

Keenan, 31 Cal.3d at 434. The specific facts of *Keenan* are significant. While the capital nature of the case was an undoubtedly significant factor, *Keenan*, 31 Cal. 3d at 430-32, the court has stood firm that a defendant must still identify some "important assistance" or "genuine need" before additional counsel would be authorized. *E.g. People* v. *Lucky*, 45 Cal.3d 259, 279, 247 Cal.Rptr. 1 (1988), *cert. denied*, 488 U.S. 1034 (1989).[16/]

While Moore cannot be criticized for having failed to present the "factual and specific need" in the context of his request for second counsel -- as any discussion was

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16. *Accord People v. Burgener*, 41 Cal.3d 50S, 524, 224 Cal.Rptr. 112 (1986); *People* v. *Jackson*, 28 Cal.3d 264, 168 Cal.Rptr. 603 (1980), *cert. denied*, 450 U.S. 1035 (1981); *People* v. *Wright*, 52 Cal.3d 367, 410, 276 Cal.Rptr. 731 (1990), *cert. denied*, 502 U.S. 834 (1991).

effectively terminated by the master calendar court -- Moore was able to present his reasons therefore during the hearing on his request for a change of counsel. Unlike *Keenan*, Moore did not present any sound basis for the trial court to approve second counsel. Although Moore identified several aspects of trial counsel's performance that he believed should have been more thorough, none of the alleged failings was due to the absence of an attorney to assist Slick. Rather, the deficiencies alleged were simply criticisms of Slick's ideas as to how to prepare for trial.[17/]

V. The Pre-Trial Motion to Discharge Slick and Proceed Pro Se

A. Overview of the Underlying Constitutional Right

On the following Monday, March 19, the final pre-trial counsel-related matter -- Moore's motion to discharge Slick and proceed *pro se* -- was taken up in the master calendar department in front of the same judge who had presided over all the prior Superior Court hearings in this case.

In *Faretta v. California*, 422 U.S. 806 (1975), the Supreme Court affirmed that the Sixth Amendment guaranteed not only a right to proceed with counsel, but also "a constitutional right to proceed *without* counsel when [the defendant] voluntarily and intelligently elects to do so." *Id.*,

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17. It should be emphasized that the harmlessness conclusion is not premised on a finding that a second attorney could not have meaningfully contributed to the defense efforts or that the trial court "could have" properly exercised its discretion to deny the motion. Those analytic approaches would be inconsistent with the very nature of the error involved -- the trial court's failure to exercise any discretion at all, thereby arriving at an arbitrary result. Rather, the Court's conclusion of harmlessness rests on the finding that, at the hearing on the motion to substitute counsel, Moore was unable to establish the prerequisites upon which the second counsel was conditioned.

at 807 (emphasis original). Few rights, however, are absolute. While the Court was firm that defendants had a right of self-representation, it provided little guidance as to how that right would be implemented. Since self-representation necessarily meant proceeding without a lawyer and, therefore, surrendering "many of the traditional benefits associated with the right to counsel," the court noted that "the accused must 'knowingly and intelligently' forgo those relinquished benefits." *Faretta*, 422 U.S. at 835.[18/]

In the years since *Faretta*, the courts have had the opportunity to refine the parameters within which the self-representation right may be invoked. Most recently, the Ninth circuit listed four principal conditions that must be satisfied: "In order to invoke the right of self-representation, the request must be (1) knowing and intelligent, (2) unequivocal, (3) timely and (4) not for purposes of delay." *Peters v. Gunn*, 33 F.3d 1190, 1192 (9th Cir. 1994); *accord Armant v. Marquez*, 772 F.2d 552, 555 (9th Cir. 1985), *cert. denied*, 475 U.S. 1099 (1986); *United States v. Arlt*, 41 F.3d 516, 519 (9th Cir. 1994).

There is no dispute but that Moore was prepared to make a knowing and intelligent waiver of his right to counsel and the benefits related to assistance of counsel. Nor can it be argued that Moore equivocated on his request.[19/] Instead, the trial court and state supreme court here found

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18. The Court refused to impose minimum qualifications for serving as one's own lawyer, but stated that "a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation." *Id.* "[H]is technical legal knowledge, as such, [is] not relevant to an assessment of his knowing exercise of the right to defend himself." *Id.* at 836.

19. Moore's letters to the court, his completion of the formal petition to proceed *in pro per*, along with his numerous statements of genuine dissatisfaction with Slick's performance in particular and his general distrust of most attorneys would clearly refute any contention that Moore's request was not sufficiently definite. *Armant*, 772 F.2d at 555; *Adams* v. *Carroll*, 875 F.2d 1441, 1444-45 (9th Cir. 1989).

that the request was untimely. The state supreme court further implied that the trial court found that the motion was made for purposes of delay. The Attorney General primarily defends the judgment based on these two contentions.

B. Moore's Motion Was Timely as a Matter of Law[20/]

1. Ninth Circuit Precedent Establishes that Moore's Motion was Timely as a Matter of Law

The Ninth Circuit rule is clear. As frequently reiterated:

> The constitutional right of self-representation, recognized in *Faretta v. California*, must be timely asserted. "A defendant must [however] have a last clear chance to assert his constitutional right . . . before meaningful trial proceedings have commenced." Thus, a motion to proceed pro se is timely if made before the jury is empaneled.

Fritz v. Spalding, 682 F.2d 782, 784 (9th Cir 1982) (brackets and ellipses original, citations omitted) (quoting *Chapman v. United States*, 553 F.2d 886, 895 (5th Cir. 1977)).

This is the standard universally applied in the Ninth Circuit, both to state habeas cases as well as to cases on direct appeal from federal trials. *United States v. Price*, 474 F.2d 1223, 1227 (9th Cir. 1973) (direct appeal); *Maxwell v. Sumner*, 673 F.2d 1031, 1036 (9th Cir.), *cert. denied*, 459

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20. *Teague*'s retroactivity analysis is no bar here since, as explained below, under any of the standards employed in the various courts, Moore's motion was timely. The only standard under which Moore's motion would not have been timely is a rule employed by only two isolated state courts. The Court finds that this minority approach is "objectively unreasonable." *Stringer*, 503 U.S. at ___, 112 S.Ct at 1140.

U.S. 976 (1982)(state habeas).[21] Under this standard, Moore's motion -- no matter when it was "deemed made" -- was timely as a matter of law since the jury was not empaneled prior thereto.[22] Not insignificantly, on both March 19 when the matter was heard in the master calendar department and on March 22 when the first relevant hearing was held in the trial department, the trial court judges were both well aware that the trial was not going to start that very day. Both knew that Slick had filed pre-trial motions -- including one that would require testimony from out-of-state witnesses -- that would prevent the actual trial from starting on the designated day [23]

Nevertheless, the Attorney General argues that this Court should depart from the law of the Ninth Circuit. He argues that the timeliness of a self-representation motion is a question of state, not federal, law and, therefore, Moore's untimeliness was a state procedural default which bars review in this court.

The simple answer to the Attorney General's argument is, of course, that the Ninth Circuit has already on several occasions applied the federal standard of state habeas cases. *Maxwell*, 673 F.2d at 1036; *Fritz*, 682 F.2d at 784; *Armant*, 772 F.2d at 555; *Savage*, 924 F.2d at 1463 at n.7.

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21. *Accord Armant*, 772 F.2d at 555 (same); *United States v. Smith*, 780 F.2d 810, 811-12 (9th Cir. 1986); *Savage*, 924 F.2d at 1463 n.7 (state habeas); *Arlt*, 41 F.3d at 519 (direct appeal).

22. Similarly, Moore's motion directly to the trial judge - which, instead of being treated as a motion to dismiss, was treated as a renewal of the motion for self-representation -- was also timely as a matter of law. Contrary to the reasoning that the reviewing court used in relation to the master calendar court's rulings, when the trial judge denied the self-representation motion he expressly acknowledged on the record that there was no likelihood that the jury would be empaneled within the following 6 days. (IA R.T. A-163:7-18.)

This Court is bound by the precedent of the Ninth Circuit and, therefore, must follow those cases applying the federal timeliness standard to state cases.[24/]

2. The Standard for Adjudging the Timeliness of a Motion for Self-representation is a Matter of Federal Significance Properly Governed by Federal Law

Notwithstanding the Ninth Circuit's clear instructions, the Attorney General argues that the timeliness of a motion for self-representation is purely a question of state procedural law, properly relegated to the state courts and immune from federal review. This is incorrect for two reasons. First, there is a substantial federal interest in

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24. As the Ninth Circuit has previously explained in the context of differing implementations of the rights confirmed by *Faretta*:

> Federal courts must apply federal constitutional law in cases properly before them under the federal habeas statute. It is thus the district court's duty to apply the law of the appropriate circuit to all persons presenting claims within its jurisdiction. State interpretations of the federal constitution and laws are persuasive authority, but a district court may consider them on federal questions only if the question is otherwise open.

Bittaker v. Enomoto, 587 F.2d 400, 402 n.1 (9th Cir. 1978) (citation omitted), *cert. denied*, 441 U.S. 913 (1979)

Here, the question is not "otherwise open." The issue has been resolved in prior Ninth Circuit cases. The "jury empanelment" rule for timeliness has clearly been held applicable to state habeas review. *Armant*, 772 F.2d at 555 (citing *Fritz*, 82 F.2d at 784, and *Maxwell*, 673 F.2d at 1036); *Savage*, 924 F.2d at 1463 n.7. The Attorney General's argument that the Ninth Circuit has allegedly "improperly overstepped its authority in doing so" is properly presented to the circuit sitting en banc or the United States Supreme Court, *Nichols v. McCormick*, 929 F.2d 507, 510 (9th Cir. 1991), *cert. denied*, 502 U S. 1115 (1992), not to this district court. *Bittaker*, 587 F. 2d at 402 n. 1.

ensuring that the *Faretta* right is not circumvented by the erection of state procedural barriers that make invocation of the right a practical impossibility. Second, the state law relied upon by the Attorney General confirms that the California courts are fully in accord with the view that the timeliness of a self-representation motion is a federal question, not a matter of state procedure.

a. The Federal Courts have Treated Timeliness as a Matter Infused with a Federal Interest

The Supreme Court did not propose standards for gauging the timeliness of a self-representation motion in *Faretta* because, in that case, the first request for self-representation was made "weeks before trial." *Faretta*, 422 U.S. at 835. While the States might be granted some leeway in establishing timeliness standard for self-representation motions, it should be beyond dispute, especially in light of the very facts of *Faretta* itself, that the State could not constitutionally establish the initial detention hearing or arraignment as the cut-off date by which a request for self-representation must either be asserted or forever waived. Yet, in Moore's case, the state supreme court announced a standard which, in practice, would have precisely that effect.

In rejecting Moore's arguments on appeal, the state supreme court did not simply conclude that the self-representation motion, deemed to have been made on the Friday preceding a Monday trial date, was properly denied because it was made on a date that trial could have begun. *Moore*, 47 Cal.3d at 79. Nor did it simply fail to consider valid the explanation tendered for the timing of the *pro se* request; the state court went further to hold, in the alternative, that the request would have been untimely even if deemed to have been made on March 5 -- nearly a month before the jury was eventually empaneled on March 29. *Moore*, 47 Cal. 3d at 80. Because the state court appears to perceive that any self-representation request that could

require a continuance would be *pro se* untimely, it has come perilously close to declaring that the right to represent oneself (especially in non-capital cases), while frequently available as a matter of theory, is virtually never available in reality. The rule applied by the state court appears to be in direct conflict with *Faretta* itself.

In adopting jury empanelment as the point when the self-representation ceases to exist as an entitlement and, rather, becomes subject to the trial court's discretion, the Ninth Circuit adopted the Fifth Circuit's analysis in *Chapman v. United States*, 553 F.2d 886. *Maxwell*, 673 F.2d at 1036; *see also Fritz*, 682 F.2d at 784. It is noteworthy that *Chapman* itself also acknowledged that the Ninth Circuit had previously used, without expressly adopting, jury empanelment as the critical point for determining timeliness. *Chapman*, 553 F.2d at 894 (citing *Price*, 474 F.2d at 1227). The Fifth Circuit also noted that jury empanelment was the crucial stage relied upon by the Second and District of Columbia Circuits as well. Beyond simply counting cases, however, the Fifth Circuit went on to explain:

> If there is to be a Rubicon beyond which the defendant has lost his unqualified right to defend pro se, it makes far better sense to locate it at the beginning of defendant's trial, when the jury is empaneled and sworn, than when defense counsel announces "ready." First, the declaration of "ready" at a calendar call bears no functional relation to the pro se right or to the actual beginning of trial; there may be many cases on a court's docket, and delays as long as the eleven days in this case [between 13 and 24 days in Moore's case] between "ready" and trial are not uncommon. Second, a defendant may not appear at calendar call, and his first opportunity directly to address the court regarding his counsel may be the day of his trial. Third, the defendant may

> acquire disconcerting information about the substance or manner or his counsel's planned defense only once counsel begins the voir dire. Fourth, the expense of any delay rises dramatically once the jury is empaneled. Finally, a mid-trial change to a pro se defense may be thought to disrupt the continuity of ongoing proceedings, a danger not present when the defendant asserts his right to defend himself before the jury is sworn.

Chapman, 553 F.2d at 894.[25]

The standard for adjudging the timeliness of a motion for self-representation is thoroughly infused with federal concern over a proper implementation of the constitutional right of self-representation.[26] In the words

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25. In *Chapman*, the Fifth Circuit noted that "Chapman's counsel announced that he was "ready" while knowing that Chapman wished to discharge him, that Chapman wished to represent himself, and that no one had yet informed the judge of a choice Chapman had already announced to his counsel." *Chapman*, 553 F.2d at 894-95. So too here, Slick announced "ready" -- whether on March 5, 9, or 16 -- "while knowing that [Moore] wished to discharge [Slick], that [Moore] wished to represent himself, and [as of the hearings on March 5 and March 9] that no one had yet informed the judge" of Moore's request. Again, in this case as in *Chapman*, "the judge postponed until [later] consideration of [the defendant's] request to discharge his counsel while at the same time accepting counsel's declaration of 'ready.'" *Chapman*, 553 F.2d at 895. As explained by the Fifth Circuit,

> To allow [a defendant's] right to defend pro se to be foreclosed merely by his counsel's declaration of ready would be fundamentally unfair when, as here, [the defendant] no longer wanted his attorney to represent him. One can hardly say that the defense is "ready" if a defendant has already parted ways with his appointed counsel.

Chapman, 553 F.2d at 895.

26. The First Circuit has noted that using jury empanelment as the marker for timeliness is consistent with the fact that this is the point when jeopardy attaches to the prosecution. *United States* v. *Betancourt-*

of the Ninth Circuit and Supreme Court, "the federal rule is an integral part of the constitutional guarantee." *Locks* 703 F.2d at 406 (quoting *Crist* v. *Best*, 437 U.S. 28, 32 (1978)). "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923). Even if the Ninth Circuit had not, on numerous occasions, applied the federal timeliness standard on state habeas review, the question of timeliness would properly be analyzed by this Court under federal constitutional standards.

b. California's Rules Regarding the Timeliness of Self-Representation Motions are Based on Federal Law

Moreover, however, the state court's own analysis of the timeliness inquiry confirms that it was based on an analysis of the federal guaranty and not an attempt to impose a state procedural hurdle in the way of prospective *pro se* criminal defendants. The state supreme court herein expressly rested its holding upon its prior decision in *People v. Windham*, 19 Cal.3d 121, 137 Cal.Rptr. 8, *cert. denied*, 434 U.S. 848 (1977). *Moore*, 47 Cal.3d at 79.

Windham, in turn, was clearly concerned with interpreting and applying the federal constitutional guaranty. Before setting forth the rule to be followed in California, the state court reviewed the cases decided in other state and federal courts, *Windham*, 19 Cal.3d at 126-27, and concluded that selfrepresentation motions made "within a reasonable time prior to the commencement of trial" invoked a "constitutionally mandated unconditional right" whereas

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Arretuche, 933 F.2d 89, 96 (1st Cir.), *cert. denied*, 502 U.5. 959 (1991).

self-representation motions made mid-trial raised no constitutional concerns. *Id.* at 128-29 & 129 n.6.

The trial court's ruling herein was similarly based on an understanding of the federal constitutional guaranty and not on a separate or independent rule of state procedure. The trial court specifically cited the state court of appeal decision in *People v. Ruiz*, 142 Cal.App.3d 780, 191 Cal.Rptr. 249 (1983), as the basis for its ruling on timeliness. *Ruiz*, to no surprise, was based explicitly on *Windham*. Further, *Ruiz* expressly acknowledged that the federal courts had interpreted the timeliness standard differently, but explained that it was obligated to follow the timeliness interpretation of the state supreme court. *Ruiz*, 142 Cal.App.3d at 788 n.3 (citing *Fritz*, 682 F.2d at 784, and *Chapman*, 553 F.2d at 894-95).

3. Moore's Motion for Self-Representation was Timely Under Any Standard

Ultimately, however, the Attorney General's argument is unavailing because, under the standards enforced in virtually every jurisdiction in the country, including the standard putatively applied by the state supreme court in *Moore*, based on the record currently before the Court, Moore's motion was timely as a matter of law.

Moore's motion was *per se* timely under the standard employed by the District of Columbia, First, Second, Fifth and Eighth Circuits as those circuits have adopted the same timeliness test as is used by the Ninth Circuit.[27] So too would the motion have been *per se*

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27. *United States v. Dougherty*, 473 F.2d 1113, 1124 (D.C. Cir. 1972); *Betancourt-Arretuche*, 933 F.2d at 96; *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 16 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966); *Chapman*, 553 F.2d at 894-95, *United States v. Wesley*, 798 F.2d 1155, 1155-56 (8th Cir. 1986) (adopting Second Circuit standard); *Fritz*, 682 F.2d at 784; *Horton v. Dugger*, 895 F.2d 714, 715, 717 (11th Cir. 1990) (jury actually sworn, but noting in dicta

timely under the standards used by the Fourth, Sixth, and Seventh Circuits. These latter three circuits have declared that self-representation motions are timely if made before "meaningful trial proceedings" have commenced, usually defined as the empanelment of the jury but with a willingness to closely scrutinize the request once jury selection has started.[28/]

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that jury selection may be crucial event).

A significant number of state courts have adopted this test for timeliness. *Barnes v. State*, 258 Ark. 565, 570-71, 528 S.W.2d 370 (1975); *State v. Cornell*, 179 Ariz. 314, 878 P.2d 1352, 1364 (1994); *Commonwealth v. Miller*, 6 Mass. App.Ct. 959, 960, 383 N.E.2d 1144 (1978) (adopting D.C. and Second Circuit standards); *People v. McIntyre*, 36 N.Y.2d 10, 17-18, 364 N.Y.S.2d 837, 324 N.E.2d 322 (1974); *Ex Parte Winton*, 837 S.W.2d 134, 135 (Tex. Crim. App. 1992) (citing *Blankenship v. State*, 673 S.W.2d 578, 585 (Tex. Crim. App. 1984)); *Stockton v. Commonwealth*, 241 Va. 192, 202-03, 402 S.E.2d 196, 201-02 (dilatory purpose is separate basis for denial), *cert. denied*, 502 U.S. 902 (1991).

28. *United States v. Lawrence*, 605 F.2d 1321, 1325 (4th Cir. 1979), *cert. denied*, 444 U.S. 1084 (1980); *Robards v. Rees*, 789 F.2d 379, 383-84 (6th Cir. 1986); *United States v. Oakes*, 853 F.2d 551, 553 (7th Cir. 1988) *cert. denied*, 488 U.S. 1033 (1989); *United States v. Jones*, 938 F.2d 737, 743 (7th Cir. 1991). Cf. *Horton*, 895 F.2d at 715, 717.

Several states have adopted this pre-"jury empanelment" test. *State v. Cromwell*, 253 Kan. 495, 505-06, 856 P.2d 1299, 1307 (1993) (prior to trial, assertion of right must be honored; mid-trial motion is untimely); *State v. Nix*, 327 So.2d 301, 354 (La. 1975) (motion made after jury selection is untimely), *cert. denied*, 425 U.S. 954 (1976); *Estelle v. State*, 558 So.2d 843, 847 (Miss. 1990) (mid-trial request is untimely).

Citing *United States v. Merchant*, 992 F.2d 1091, 1095 (10th Cir. 1993), the Attorney General incorrectly groups the Tenth Circuit as being among the circuits that have departed from the jury empanelment approach. Merchant did not involve invocation of the right to proceed *pro se*. Rather, it involved an attempt at mid-trial withdrawal of *pro se* status with a concurrent reinvocation of the right to counsel. The Tenth Circuit there held that the request for counsel was unduly delayed and, therefore, properly denied since the government had proceeded through two thirds of its case. The question at issue in *Merchant* was very

So too would Moore's motion been found timely under the test used in the only remaining circuit, the Third, which does not consider timeliness to be an independent factor in determining whether to permit self-representation. Rather, it has simply focused on whether the motion was made in good faith and not interposed as a tactic to secure unjustifiable delay.[29/]

Although not employed by any of the federal courts, a handful of States have adopted a standard similar to the one announced by California in *Windham*, 19 Cal.3d 121, and purportedly applied by the state supreme court in *Moore*, 47 Cal.3d at 79.[30/] Under this standard too,

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different from the question at issue here -- the time by which defendants must assert their right to proceed *pro se*. No other Tenth Circuit case appears to have resolved the question at issue herein. Further, as a case involving a mid-trial request, it can hardly be said that the Tenth Circuit in Merchant rejected the majority approach adhered to by the Ninth Circuit.

29. *Government of Virgin Islands v. James*, 934 F.2d 468, 470 (3d Cir. 1991); *United States v. Welty*, 674 F.2d 185, 187 (3d Cir. 1982). While the Third Circuit uses a different analytical framework, its analysis is not inconsistent with the Ninth Circuit's. For, in determining whether a self-representation motion must be granted, the Ninth Circuit has added as a separate element, beyond pure "timeliness," that a self-representation motion need not be granted if interposed for purposes of delay. *Adams*, 875 F.2d at 1442; *Fritz* 682 F.2d at 785. This test has also been adopted by two state courts. *Snead v. State*, 286 Md. 122, 132, 406 A.2d 98, 103 (1979); *People v. Dennany*, 445 Mich. 412, 432 n.12, 519 N.W.2d 128, 136 n.12 (1994); *Hamiel v. State*, 92 Wis. 2d 656, 285 N.W.2d 639, 649 (1979).

30. *People v. Mogul*, 812 P.2d 705, 708 (Colo. 1991); *Lyons v. State*, 106 Nev. 438, 445-46, 796 P.2d 210, 214-15 (1990); *Matter of Richardson*, 100 Wash.2d 669, 674-75, 675 P.2d 209 (1983) (citing *State v. Fritz*, 21 Wash.App. 354, 360-61, 585 P.2d 173 (1978) (adopting *Windham* standard)); *Williams v. State*, 655 P.2d 273, 276-77 (Wyo. 1982); *State v. Sandler*, 175 W.Va. 572, 574 n.2, 336 S.E.2d 535 (1985) (motion on day of trial not timely, but subject to exercise of discretion in light of circumstances of the case, citing *State v. Sheppard*, 172 W.Va. 656, 310 S.E.2d 173, 189-90 (W.Va. 1983)).

however, it would have been error to deny Moore's motions untimely.

In *Windham*, the California Supreme Court held that a motion to proceed *pro se* would be timely if asserted "within a reasonable time prior to the commencement of trial." *Id.*, 19 Cal.3d at 128. In addition, the court remarked that motions interposed at a later time should also be deemed timely if conjoined with "some showing of reasonable cause for the lateness of the request." *Id.* at 128 n.5. The *Windham* court expressly cautioned, however:

> Our imposition of a "reasonable time" requirement should not be and, indeed, must not be used as a means of limiting a defendant's constitutional right of self-representation. We intend only that a defendant should not be allowed to misuse the *Faretta* mandate as a means to unjustifiably delays a scheduled trial or to obstruct the orderly administration of justice.

Id. (emphasis original).

Thus, the court explained:

> When the lateness of the request and even the necessity of a continuance can be reasonably justified the request should be granted. When, on the other hand, a defendant merely seeks to delay the orderly process of justice, a trial court is not required to grant a request for self-representation without any ability to test the request by reasonable standards.

Id.

Although the state supreme court herein purported to apply the *Windham* standard, the only inquiry it undertook was whether the motion was made in close proximity to trial. But *Windham* required more. No different than the Ninth Circuit's analysis in *Fritz*, *Windham* acknowledged that there

are often "situations in which a request for self-representation in close proximity to trial can be justified. When the lateness of the request and even the necessity of a continuance can be reasonably justified the request should be granted." *Windham*, 19 Cal.3d at 125 n.5.

The record before this Court -- uncontested by Respondent - plainly demonstrates that Moore had more than adequately justified the timing of his request.[31/]

The master calendar judge did not question Moore's description of the timing of events. Nor did the

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31. While the state supreme court found that Moore's motion was not "made" until Friday March 16, when the hearing was eventually held, this finding -- if considered "factual" and therefore within the scope of § 2254(d)'s presumption of correctness -- is plainly contradicted by the record. 28 U.S.C. § 2254(d)(8).

The state court reasoned that "what defendant was requesting with regard to counsel . . . [was] not readily apparent from the letter." *Moore*, 47 Cal.3d at 79. It found, therefore, that "the date of the hearing, when the court was able to elicit from defendant his concerns, [is the date] that we must treat as the date of defendant's *Faretta* motion." *Id.*

This analysis is in plain conflict with the undisputed record. Moore's letter to the court was in no way ambiguous as to his intention to seek permission to proceed pro se. At the conclusion of his letter, Moore asked for two specific forms of relief, the first was to be permitted to attend all future court hearings, and the second was, in Moore's own words:

> 2) I ask that the court appoint me co-council (sic) with another lawyer *or allow me to go pro-per, which is my constitutional right "of self-representation" (sic) under the Sixth Amendment. Farett (sic) v. Calif.*, 422 U.S.

Insofar as is relevant to applying the "reasonable time before trial" standard, the state court's finding regarding the date of the motion is clearly rebutted by the record. "Convincing evidence" -- i.e., the undisputed record -- clearly establishes "that the factual determination by the state court was erroneous." 28 U.S.C. § 2254(d). (Under the governing Ninth Circuit standard, of course, this finding is of no consequence.)

California supreme Court.[32] In light of the procedural posture of this case, this Court need not question the accuracy of the statements contained in Moore's letter. Since the Attorney General does not seek to supplement the record in this regard, for purposes of summary judgment, the Court finds that Moore's reasons for the timing of his motion were those expressed in his letter.[33] Those reasons more than adequately justified the timing of the self-representation motion.[34] In light of the compelling

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32. In rejecting Moore's explanations without seriously considering the reasons for the timing of Moore's request, the state court steered a course very similar to the one taken by Kentucky and Indiana -- both of which consider only the proximity of the trial date and disregard any reasons for the timing of the request. *Moore v. Commonwealth*, 634 S.W. 2d 426, 430-31 (Ky 1982); *Smith v. State*, 474 N.E.2d 973, 979 (Ind. 1985). These are the only two jurisdictions in the nation -- with California arguably joining as a third in light of the functional analysis applied in Moore -- to employ such a stringent approach to the timeliness of a self-representation motion.

33. In light of the master calendar judge's acceptance of Moore's description of the pre-letter events and the state supreme court's finding that the trial court was "well aware of defendant's stated reasons," these facts might even be entitled to the statutory presumption of correctness. 28 U.S.C. § 2254(d).

34. Moore's initial complaint focused on Slick's preparation for trial and refusal to interview Mr. Jones. Whether Moore was correct in his assessment of Slick's readiness is not relevant. Equally irrelevant is whether the trial court agreed. "It's the client's comfort, not the judge's, that the Sixth Amendment protects." *Lillie*, 989 F.2d at 1056. Thus, the critical facts were that Slick's efforts were unsatisfactory to Moore, that Moore's criticisms were not spurious, and that these were bona fide expressions of discomfort, not simply manufactured disputes designed to impede the judicial process.

Moore could not reasonably be expected to complain of Slick's trial preparation until that preparation was substantially completed. Indeed, at the previous status conferences Slick himself acknowledged that his investigation was not yet complete Any earlier criticism of trial counsel's preparation efforts would have been premature.

Once it is clear that the dispute did not arise until March 5, it is also clear that Moore did not unduly delay presentation of his request to

proceed *pro se*. The March 5 confrontation between Moore and Slick occurred shortly before a status conference in the master calendar court. Slick abandoned Moore in the holding cell outside the courtroom. While concurring in a four-day continuance to accommodate the prosecutor, Slick did not mention Moore's dissatisfaction with Slick's own preparation. Moore was not present at that hearing to express his desire to proceed *pro se*.

The events at the hearing, in fact, reinforce the reasonableness of the self-representation motion's timing. While Moore's *pro se* request was conditioned on the trial court's refusal to remove Slick and refusal to grant Moore co-counsel status, Moore's desire to excuse slick entirely Was strongly fortified when Slick went to the March 5 hearing -- knowing that Moore disagreed with Slick's state of readiness and knowing that Moore desired to request co-counsel or *pro se* status -- and left Moore in the holding cell outside the courtroom and conveyed to the court none of Moore's concerns. Prior to the March 5 meeting, Moore was primarily interested in co-counsel status. After being upbraided by Slick and then excluded from two hearings, however, Moore concluded that his primary objective should be to have Slick entirely removed from the case or at least subordinated to someone else. Moore's sense of betrayal -whether reasonable or not -- could not have been expressed to the court prior to these events actually having taken place.

According to Moore's letter, after the March 5 hearing, Slick informed him that the case had been trailed until Friday March 9. It was entirely reasonable for Moore to expect to be present at the March 9 hearing and to be permitted to present his complaints about counsel that same week. Withholding his complaints about Slick for these few days was fully justified.

As fate would have it, however, on March 9, Moore was again excluded from the hearing and was later informed that the case had been continued again for another week.

At this point, Moore realized that he would have to take affirmative steps to guarantee himself an audience with the court. And, indeed, he did so. Over the weekend following Friday March 9, Moore prepared a letter to the court explaining his difficulties with Slick and clearly expressing his desire to proceed *pro se* if no other solution was available. The letter was dated Saturday March 10 and postmarked Monday March 12. Moore acted as swiftly as reasonably could be expected. He cannot be faulted for the trial court's failure to address the matter any earlier.

On direct appeal, however, while quoting *Windham*'s language that a request made in close proximity of trial need not be granted "without some showing of reasonable cause" for the timing of the request, *Moore*,

justification for the timing of Moore's motion and the clear fact that it was presented at Moore's first opportunity to do so, the state court never explained why these reasons did not provide the requisite showing of "reasonable cause." Indeed, while the majority took pains to distinguish the controlling federal authority and the dissents reliance thereon, the majority never explained why Moore's motion was not sufficiently prompt other than to remark that "the trial court herein was well aware of defendant's stated reasons for delay in asserting his right to self-representation." *Moore*, 47 Cal.3d at 81.

It is perverse to find a self-representation request untimely or unjustifiably delayed when it could not reasonably have been presented any earlier. Even if the appropriate standard for gauging the timeliness of a self-representation motion were the standard set forth in *Windham*, the state court erred in applying that rule to the facts of Moore's case. Under any viable standard, Moore's motion was timely.[35/]

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47 Cal.3d at 79, quoting *Windham*, 19 Cal.3d at 128, the court barely acknowledged the reasons for the timing of Moore's self-representation motion and certainly never directly confronted their legitimacy.

35. The Court emphasizes that, by engaging in the foregoing analysis, it has not accepted Moore's invitation to re-apply California's rule to determine whether the motion was timely under California state law. The state courts are the final expositors on the interpretation of state law and the state's interpretation is binding on the federal habeas court unless it is "untenable" or "appears to be an obvious subterfuge to evade consideration of a federal issue." *McSherry v. Block*, 880 F.2d 1049, 1053 n.3 (9th Cir. 1989), *cert. denied*, 499 U.S. 943 (1991), See also *Knapp v. Cardwell*, 667 F.2d 1253, 1260 (9th Cir.), *cert. denied*, 459 U.S 1055 (1982); *Aponte v. Gomez*, 993 F.2d 705, 707 (9th Cir. 1993). As such, the federal habeas court is not empowered to decide whether the state court's ruling was a correct application of the state law. *Estelle*, 502 U.S. at 67-68. Cf. *McKinney v. Rees*, 993 F-2d 1378, 1380 (9th Cir.), *cert. denied*, 114 S.Ct. 622 (1993); *Suniga v. Bunnell*, 998 F.2d 664, 668 (9th Cir. 1993). That is a function exclusively relegated to the state courts.

C. Moore's Motion Was Not Made for the Purpose of Delay

1. The State Courts' Factual Findings

The trial court did not find that Moore's motion was made for the purpose of delay. Rather, insofar as postponement of the trial date is concerned, the trial court rather clearly premised its ruling on the finding that delay would result -- not that delay was the motivation or purpose.

In fact, the master calendar court never inquired into Moore's justification for the timing of the motion. While the master calendar judge repeatedly told Moore that he would be permitted to represent himself only upon demonstrating that he was making a voluntary and intelligent waiver of his right to counsel (IA R.T. 12:19-13:5, 13:21-23, 20:10-18, 20:23-24, 24:27, 29:28-30:5), not once did the judge ever suggest that the outcome of Moore's motion would depend on whether there was "a very good reason" for the timing of his motion. As acknowledged by the Attorney General and the state supreme court, by virtue of Moore's letter, the court was "well aware of defendant's stated reasons" for the timing of his self-representation request. Contrary to the Attorney General's argument, however, the clear inference from this is that the trial court did not question the genuineness of Moore's request.[36/]

There is no need to question whether the state court's interpretation of its rule is "untenable" or "an obvious subterfuge" since the analysis here is simply that, even if the *Windham* standard were in fact the federal constitutional standard, Moore's motion should have been found timely.

36. Although the master calendar judge repeatedly stated that he had to assure himself that Moore was not attempting to "commit legal suicide", the trial court never expressed discomfort with the timing of Moore's motion. Indeed, the proximity to trial and potential need for any continuance -- let alone a substantial continuance -- were never raised until the master calendar judge impressed upon Moore the shallowness of Moore's understanding of the legal process.

The trial court did find that Moore was "unwilling" to proceed to trial that day if granted the right to represent himself.[37] Contrary to Respondent's argument, however, the trial court did not find that Moore invoked his right of self-representation in order to obtain a delay or to impede the administration of justice. The trial court found only that granting the request would have required a continuance, even if that effect was not initially intended by Moore.

"[A]bsent an affirmative showing of purpose to secure delay," however, this was not a sufficient ground for denying Moore his constitutional right to represent himself. *Fritz*, 682 F.2d at 784 (emphasis original). The alleged finding by the trial court that Moore was acting with a dilatory purpose is not entitled to a presumption of correctness because the trial court never made such a finding. 28 U.S.C. § 2254(d)(1).

While the trial court ultimately found that substitution of counsel was unnecessary, the ruling established only that the master calendar judge had more faith in Slick's skills and preparation than did Moore. The trial court never insinuated and never found that Moore's complaints were fabricated, only that they were not sufficiently serious or objectively compelling in light of Slick's explanations. The trial court, however, was not the client; Moore was. Irrespective of the trial court's faith in Slick, Moore retained the right to proceed without counsel even close to the trial date so long as he was not invoking his *pro se* rights for an improper purpose. *Cf. Lillie*, 989 F.2d at 1056.

37. This factual finding is entitled to a presumption of correctness under § 2254(d) and, on the current record, is not reasonably subject to debate. Yet it is not beyond dispute.

Moore never stated that his self-representation motion was conditioned on the granting of a continuance. Initially, it appears, Moore anticipated only a brief continuance, if any at all, to enable him to locate and interview Mr. Jones. The need for any significant continuance did not arise until the master calendar judge drilled Moore on his lack of understanding of basic legal principles. While the master calendar judge clearly impressed upon Moore the degree of his inability to manage a trial, the court never asked Moore whether he was willing to proceed to trial that day if granted *pro se* status.

Moreover, nor did the state supreme court supply the missing ingredient. The state supreme court did not make an independent finding that Moore's motive was to thwart the proceedings. 28 U.S.C. § 2254(d)(1). Instead, it found no more than that the trial court was correct in its conclusion that delay would result and that the attendant delay would inconvenience the courts and prejudice the prosecution. Having noted, however, that the trial court never made such a finding,[38] the state appellate "finding" cannot be said to be either an independent finding of dilatory purpose nor can it be said to be "fairly supported by the record." *Parker v. Dugger*, 498 U.S. 308, 320 (1991).[39]

2. Even Assuming the State Supreme Court Made a Finding of Intent to Delay, the Finding Would Not be Entitled to the Presumption on the State of This Record

Moreover, however, even if the state supreme court could be said to have made a factual finding on Moore's intent to delay, Ninth Circuit precedent clearly establishes that, on the facts of this case, this Court could not defer to that finding as presumptively correct. The Ninth

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38. When the trial court discussed the possibility of a continuance, for example, it clearly did so in the context of forewarning Moore that the risks encountered by proceeding *pro se* included that he would be forced to start trial immediately. (IA R.T. 30:15-32:2.) Moore never suggested that he was unwilling to accept this as one of the drawbacks of self-representation. The court never suggested that Moore's desire for a continuance would itself be a basis for denying his self-representation motion.

39. Moreover, it is debatable whether the trial court hearing was "full and fair" for purposes of the appellate court's alleged finding since the trial court never questioned the sincerity of Moore's reasons for the timing of his motion or whether they were motivated by an intent to delay. *Fritz*, 682 F.2d at 785. 28 U.S.C. § 2254(d)(2), (6). Nor is it clear that the "material facts were . . . adequately developed." *Fritz*, 682 F.2d at 785. 28 U.S.C. § 2254(d)(3).

Circuit's leading case in this area, *Fritz*, 682 F.2d 782, is clearly instructive.

As in *Fritz*, the only finding of dilatory purpose could have come from the appellate court.[40/] In *Fritz*, as here, such a finding was not entitled to the statutory presumption of correctness because the material facts were not fully developed at the state trial court hearing and because the defendant was not afforded a full and fair opportunity to develop those facts at that hearing. A key consideration was that the trial court never inquired into the topic:

> Both the state presiding judge and the state trial judge held hearings on Fritz's motion to defend himself. Neither judge made an express inquiry into Fritz's purpose, however, focusing instead on the nature of the *Faretta* right and on Fritz's ability to waive knowingly his right to counsel.

Fritz, 682 F.2d at 785.

The Ninth Circuit acknowledged that the trial court hearings were not wasted efforts, but highly relevant on habeas -- albeit not complete:

> To be sure, much of the evidence adduced at the hearings is pertinent to Fritz's motivation. The evidence is incomplete, however, and material facts -- such as when it became clear that Fritz and [his attorney] had irreconcilable differences, and whether Fritz had a bona fide reason for not asserting his *Faretta* right before the morning of trial -- were never developed.

Fritz, 682 F.2d at 785.

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40. Respondent tacitly concedes as much by not even arguing that the trial court made the alleged finding of dilatory motive.

So too it is here. The trial court judges here never expressly inquired into the reasons for the timing of Moore's motion. Further, unlike *Fritz*, the inferences from the facts are not conflicting. Moore had not previously dismissed attorneys nor taken any other actions to impede the smooth progress of any earlier trial dates. The Attorney General identifies nothing in the circumstances surrounding Moore's case that could justify an inference that the motion was abusive other than the bare fact that it was presented close to trial.[41/] The reasons for its timing having been clearly justified and never having been disputed by any court, the state court finding -- assuming for the sake of argument that there was such a finding -- would not be entitled to a presumption of correctness for an additional reason: it would not be "fairly supported by the record." 28 U.S.C. S 2254(d)(8).

3. The Undisputed State of the Record Indicates that Moore's Motion was Not Made for Purpose of Delay

Moreover, however, the state court analyzed only half of the issue. While the state supreme court emphasized the Ninth Circuit's discussion of some of the factors that could support a finding of dilatory purpose -- the proximity

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41. The Attorney General briefly argues that Moore's request for a continuance in light of the prosecution's witness problem is strong indicia of a malevolent purpose. This is hollow rhetoric. First, there is no suggestion that, when Moore originally wrote his letter sometime before March 12, Moore had any idea that the prosecution might incur witness problems if the case were continued -- certainly none were indicated at the previous hearings where Moore was present. Further, there is no indication that, at the time Moore initially made his request, he intended to seek any continuance whatsoever. Finally, absent a showing of delay or an untimely request, the possibility that witnesses might suffer some minor inconvenience is simply not a factor in resolving whether a criminal defendant will be permitted to go to trial with or without an attorney.

to trial, whether delay would result, and prior dilatory conduct -- the state court inexplicably overlooked the remainder of the federal analysis, beginning with the very next sentence: "The inquiry, however, does not stop there." *Fritz*, 682 F.2d at 784. The Ninth Circuit explained, and the state supreme court failed to continue:

> The court must also examine the events preceding the motion, to determine whether they are consistent with a good faith assertion of the *Faretta* right and whether the defendant could reasonably be expected to have made the motion on at an earlier time.

Fritz, 682 F.2d at 784-85.

In this case, the "events preceding the motion" strongly suggest a finding of good faith on the part of Moore in interposing his self - representation motion.[42/] Although the record could be supplemented to clarify the motivations and factors existing at the time of Moore's motion, the Attorney General has affirmatively disavowed the need for an evidentiary hearing. Further, the Attorney General has failed to identify any additional facts that it would present at such a hearing if given the opportunity to do so.[43/]

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42. Moore's primary dispute focused on Slick's degree of preparation. Slick apparently did not discuss his preparation and investigation until shortly before the March 5 conference Indeed, even at the March 16 hearing, when Slick stated that he had conferred with Moore, Moore concurred but clarified that the discussion was limited to one part of one witness's testimony. The trial court asked for no further clarification from Slick about the degree of his conferences with Moore nor gave any indication that it found Moore's statement to be unbelievable.

43. Petitioner, by contrast, has specifically averred that he could and would supplement the record to further bolster his position on all unresolved factual issues. *Fritz*, 682 F.2d at 784-86. The Attorney General suggests that *Keeney v. Tamayo- Reyes*, 112 S.Ct. 1715, bars an evidentiary hearing on this claim. It is not entirely clear that this would

D. The Self-Representation Motion Was Improperly Denied

The trial court offered several other miscellaneous reasons allegedly justifying the denial of the motion. As explained below, none are legally sound.

The trial court's reference to "interfer[ence] with the orderly administration of justice" is not supportable since the record does not establish that a continuance would have been absolutely necessary. At the outset of the hearing, the only additional task Moore sought to perform was to have Mr. Jones interviewed. Had Moore's motion been addressed closer to the time it was received it is entirely possible that no continuance would have been requested but for the trial court's persistence in impressing upon Moore the degree of his unfamiliarity with the adjudicatory process.[44/]

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be so. *Tamayo-Reyes* held that, when a habeas petitioner actually had an evidentiary hearing in state court and negligently failed to submit critical evidence that was available at the time, he would have to prove "cause and prejudice" before being entitled to an evidentiary hearing under one of the six circumstances in which *Townsend v. Sain*, 372 U.S. 293, 313-18 (1963), held that a hearing would be mandatory. *Tamayo-Reyes*, 112 S.Ct. at 1721. It is far from clear that Moore's failure to further develop the reasons for the timing of his motion can properly be criticized as "negligent." Further, Tamayo-Reves did not purport to limit the five other situations in which an evidentiary hearing is mandatory. Nor did *Tamayo-Reyes* purport to constrain the instances in which the federal court could exercise its discretion to hold a hearing. Most significantly, however, *Tamayo-Reyes* never suggested that its "cause and prejudice" standard would be applicable to situations where the issue was not only not decided by the state tribunal, but had not even been an issue in dispute.

44. This is not to say that the trial court erred in impressing upon Moore the dangers of representing himself. To the contrary, such information was crucial to ensuring that Moore's waiver of counsel was informed and intelligent. *Faretta*, 422 U.S. at 835. *United States v. Mohawk*, 20 F.3d 1480, 1484-85 (9th Cir. 1994); *United States v. Balough*, 820 F.2d 1485, 1487 (9th Cir, 1987). Rather, the crucial factor here is that Moore was not initially seeking a continuance and,

Furthermore, once the trial court persuaded Moore that he was not ready to begin trial immediately, the trial court never inquired into how much time Moore envisioned in order to prepare himself for trial. Certainly Moore would not have been entitled to a continuance long enough for him to attend law school and pass the bar. (IA R.T. 31: 16-19.) The master calendar court knew, however, that several motions would have to be heard before trial and that the witnesses for those motions were not all local. The judge, therefore, also knew that trial would not start that same day nor, likely, within the next week. In light of pending motions, had Moore requested only a week or a few days to prepare for trial, it is unlikely that any continuance at all would have been necessary. Moore likely would have been able to be ready within the time already set for trial. The master calendar judge, however, never asked.

Moreover, Moore never conditioned his self-representation rights on the granting of a continuance; he only said that he was not ready to begin trial "this afternoon." Although Moore had expressed a desire for a continuance, he never suggested that he desired to withdraw the *pro se* request if a continuance was not to be granted. Since Moore was willing to accept *pro se* status even if the trial were not continued beyond "this afternoon," the trial court erred using Moore's desire for a continuance as a basis for denying Moore's request to proceed *pro se*.

The master calendar judge's reliance on Slick's having previously declared ready for trial is also an insufficient basis for denying Moore's motion. *See Chapman*, 553 F.2d at 894, cited with approval by *Maxwell*, 673 F.2d at 5036; *Fritz*, 682 F.2d at 784.

To impute to Moore Slick's declaration of "ready" during a conference that Slick had effectively prevented Moore from attending and at a time when Slick knew that Moore disagreed with his state of readiness and wished to

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therefore, cannot be accused of having interposed the motion for an ulterior purpose.

discharge him is premised on the "tenuous and unacceptable legal fiction" expressly criticized by the Supreme Court. *Faretta*, 422 U.S. at 821.

The judge's reliance on the state law speedy trial clock is also unavailing. Although the hearing was held on the 54th of 60 allowable days, state law allowed the trial to commence up to 10 days thereafter Cal. Pen. Code § 1382(b). The State thus had sixteen days, not six, in which to bring Moore to trial. More significantly, however, is that the speedy trial time is subject to waiver by the defendant. There is nothing to suggest that the State could not have conditioned an extended continuance on Moore's willingness to stipulate to the abeyance of the speedy trial clock during the continuance.

Next, neither the trial court nor the Attorney General identify anything unusual in coordinating the trial date with the out-of-state witnesses other than the normal difficulties in rearranging travel and vacation schedules. The Court has found no decision holding that a defendant's right to represent himself can appropriately be conditioned on the convenience of witnesses' vacation schedules. The defendant's constitutional rights surely must take precedence.[45/]

The final reason given by the master calendar judge was that Moore was "unwilling" to proceed to trial that day. Regardless of the accuracy of this finding, it is a classic red herring. The trial was not expected to start "that afternoon." Indeed, not even the prosecutor was ready to start that day -- he had already announced a need for "one or two days

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45. Unlike the California Court of Appeal case of *Ruiz*, there is no allegation that Moore was threatening witnesses or hoping to use the delay as a means of deterring witnesses from testifying against him. Further, the prosecution's expressed concern of losing witnesses is beguiling. Having voluntarily postponed the initial filing of the case for nearly five and a half years and still having managed to maintain control over its witnesses for an additional year, there is no credible suggestion that the district attorney could not have weathered a few additional weeks in order to allow Moore to prepare for a trial at which he would present his own defenses, not those developed by Slick.

lead time" to have the out-of-state witnesses to come in for pre-trial motions. Moreover, a defendant's inability to commence trial proceedings immediately is not, without more, a basis for denying a request to proceed *pro se*. *Armant*, 772 F.2d at 554-58; *Fritz*, 682 F.2d at 784-85.

E. Conclusion

Moore's motion for self-representation satisfied all the requirements entitling him to permission to represent himself. Improperly forcing counsel on a defendant against his will is structural error and, therefore, "not amenable to harmless error analysis." *Arlt*, 41 F.3d at 524, quoting *Adams*, 875 F.2d at 1445. *Peters*, 33 F.3d at 1193. "The improper denial of this right [to represent oneself] is 'per se prejudicial errors and thus requires automatic reversal of a criminal conviction." *Arlt*, 41 F 3d at 524, citing *Savage*, 924 F.2d at 1466.[46/]

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46. The Attorney General suggests that, if the writ is granted on this claim, the appropriate remedy should be to force Moore to proceed *pro se* at any retrial. Contrary to the Attorney General's insinuations, this is inconsistent with Moore's request to the trial court. While Moore plainly expressed that, in entire scheme of things, he would prefer to be represented by a lawyer, he was also very clear that "[i]f the court would not order substitute counsel, he wished to represent himself." *Adams*, 875 F.2d at 1445. The condition suggested by the Attorney General would thus only be relevant if the trial court were to appoint Slick as defense counsel for any retrial.

In light of their previous conflict and the results of the trial, after reviewing the vigorous pleas by Moore to proceed without Slick despite the overwhelming obstacles, there is little doubt that if required to make the choice, Moore would again opt to proceed *pro se* rather than be represented by Slick. This, however, is a choice that need be made only if Slick is again appointed defense counsel. If the situation arises, Moore will have to make the choice voluntarily and intelligently, fully informed of the consequences of his actions. *Faretta*, 422 U.S. at 835, *Mohawk*, 20 F.3d at 1484. This is not a decision that can or should be thrust upon him without a hearing.

VI. The Mid-Trial Motion to Discharge Slick and Proceed *Pro Se*

Moore's final claim under submission challenges the trial court's denial of permission to discharge Slick and proceed *pro se* beginning with the defense closing argument. The Attorney General presents two defenses -- that, as a mid-trial motion, it was untimely and that, on the merits, the trial judge acted within his discretion.

A. Scope of the Substantive Right Involved

The parties both treat this claim as a genuine dispute over the scope of a criminal defendant's self-representation rights. Moore styles his claim as a denial of his right to represent himself. The trial judge recognized the motion as such. The Attorney General does not contend that this is simply a disguised request designed to circumvent the general rule that represented defendants need not be granted the right to address the jury. *E.g. United States v. Dellinger*, 472 F.2d 340, 408 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

In support of his claim, Moore relies heavily on an observation included in the *Faretta* opinion itself. In appraising the very existence of a right of self-representation, the Supreme Court pointed out its previous implicit recognition of such a right. The Court in *Faretta* observed that, in *Snyder*'s discussion of the importance of the defendant's right to be present in the courtroom, the court remarked:

> [T]he "defense may be made easier if the accused is permitted to be present at . . . the summing up of counsel, *for it will be in his power*, if present, to give advice or suggestion or *even to supersede his lawyers altogether and conduct the trial himself.*"

Faretta, 422 U.S. at 816 (emphasis in original) (quoting *Snyder*, 291 U.S. at 106).

Based on this excerpt from *Faretta*, Moore argues that he had an unconditional right to represent himself at closing argument and that the trial court's denial of this motion violated the constitutional right.[47]

B. The Claim Cannot Be Denied on the Basis of Timeliness

The Attorney General's first defense rests on the principle recognized in virtually all jurisdictions -- that a self-representation motion is generally untimely if not asserted until mid-trial. *Smith*, 780 F.2d at 811-12. While the general rule that mid-trial requests are untimely may appear to conflict with the language from *Faretta* quoted above, *id.*, 422 U.S. at 816, the two need not be harmonized here. The timeliness of Moore's second request to represent himself "did not underlie the district court's exercise of its discretion to deny the motion, and thus we do not find it dispositive of this issue." *Walker*, 915 F.2d at 483. Accord *Price*, 474 F.2d at 1227, *Peters*, 33 F.3d at 1192. Further,

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47. While the parties discuss other cases, the "right" involved truly emanates from *Faretta* and nowhere else. While a handful of cases do address the contours of a criminal defendant's right to present closing argument, none of them do so in the context of request for self-representation. Rather, the cases either involve situations where the defendant was represented by counsel, did not want to waive counsel, and requested "hybrid" co-counsel status for closing argument, e.g. *Dellinger*, 472 F.2d at 408, or involved situations where the trial court actually permitted the defendant to present closing argument and the issues on appeal were whether the partial waiver of counsel was knowing and voluntary, e.g. *Watts* v. *United States*, 273 F.2d 10, 11-12 (9th Cir. 1959), *cert. denied*, 362 U.S. 982 (1960).

A different situation arises when the defendant did not testify and is seeking to use closing argument as an attempt to present evidence to the jury without being under oath or subject to cross-examination. *Bassette* v. *Thompson*, 915 F.2d 932, 941 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991); *United States* v. *Tucker*, 773 F.2d 136, 141 (7th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986).

"[t]he record contains no hint that the motion was a tactic to secure delay, and there is nothing that suggests that any delay would have attended the granting of the motion." *Price*, 474 F.2d at 1227.[48/]

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48. As observed by the Fifth Circuit, the propriety of demarcating self-representation requests by reliance on whether the trial has commenced is not beyond reproach:

> *Faretta* casts doubt on the practice of characterizing the pro se right as unqualified before trial but committed to the discretion of the court thereafter. *United States* v. *Garcia*, 517 F.2d 272, 277 n.4 (5th Cir. 1975), has been read to suggest that *Faretta* may have "eroded" earlier decisions that relied on this distinction between pre- and mid-trial assertion of the right.

Chapman, 553 F.2d at 893 (citations and footnote omitted). *Accord Barnes*, 258 Ark. at 570-71. Nonetheless, the distinction is adhered to by the Ninth Circuit and, therefore, binding on this Court. *Smith*, 780 F.2d at 811-12.

The holding in *Smith* is, of course, distinguishable in numerous respects. If nothing else, the holding was impacted by the fact that not only was the motion not raised before trial, but it had not even been raised at the defendant's first opportunity to do so: "the request, made half-way through trial, was not timely because it was based on matters that occurred prior to trial." *Smith*, 780 F.2d at 812.

Here, by contrast, while Moore was clearly disillusioned with Slick prior to trial, he raised those concerns forthwith. His motion was denied. Moore renewed his request to represent himself beginning with closing argument upon learning -- in the middle of trial -- that Slick had no intention of highlighting a significant number of inconsistencies in the prosecution's key witness's testimony. Unlike the defendant in *Smith*, it is not reasonably probable that Moore could have raised these additional concerns any earlier.

Nor was this a situation where "the trial [which was already underway] would need to be continued if the request were granted." *Id.*, 780 F.2d at 812. Moore emphasized that he was ready to proceed with closing argument forthwith. There is no contention that delay was either intended or would result.

Finally, also unlike *Smith*, it is not at all clear that Moore can properly be penalized for having made a mid-trial request when all his earlier requests had in fact been denied. Unlike *Smith*, Moore's first

C. The Trial Court Failed To Consider The Relevant Factors For Exercising Its Discretion

Even if the motion were considered untimely, however, the result is that the right is subject to the exercise of the trial court's discretion in light of various factors -- the need to minimize disruptions, considerations of convenience and delay, maintaining continuity and the ongoing flow of trial proceedings, avoiding jury confusion, and the defendant's reasons for the timing of the request and the reasons for the request itself. *United States* v. *Matsushita*, 794 F.2d 46, 51 (2d Cir. 1986); *United States* v. *Dunlap*, 577 F.2d 867, 868 (4th Cir.), *cert denied*, 439 U.S. 858 (1978); *United States* v. *Tucker*, 773 F.2d 136, 141 (7th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986). The California Supreme Court has identified these same factors as the appropriate guide for the trial court. *Windham*, 19 Cal.3d at 128-29. On one significant point there is no dispute: the trial court failed to consider any of these factors.

Moore had substantial and legitimate reasons for requesting *pro se* status. The essence of the prosecution's case was that Moore developed the plan to go to the Crumb's apartment to steal their recently-collected rent receipts and that, after the robbery, the Crumbs would be killed. The prosecution contended that Moore, his co-defendant Lee Harris, and the immunized accomplice Avery went to the Crumb's apartment, stole money and jewelry and, while there, Moore personally killed the Crumbs.

Moore was a former tenant of the building and admitted that he had devised the plan to rob the Crumbs. He testified, however, that he did not participate in the robbery and that murder was never part of the plan. According to Moore, earlier on the day of the killings, he went by the

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assertion of the right of self-representation was not during the middle of trial, but well before the beginning of the actual trial. His second assertion of his self-representation rights -- the one made during trial -- was based on events that had transpired during trial.

apartment building with Avery and Harris and told them how they could enter. He specifically did not go with Avery and Harris that evening because he knew that the Crumbs would recognize him. This was arguably corroborated by the testimony of Mr. Jones, who is the person that enabled Avery and Harris to enter. Jones stated that he knew Moore, would have recognized Moore, and did not see Moore at the apartment building that night.

Moore's explanation was no great testament to his moral fiber and could have amply supported convictions for the burglary, robbery, and possibly also felony-murder. Nonetheless, if the jury believed his version of events -- or at least had a reasonable doubt as to the prosecution's theory -- it could not have found that the special circumstances were true, which required that Moore participated in the killings or intended for the Crumbs to be killed. Without the special circumstances, Moore was ineligible for the death penalty.

As plainly recognized by both the prosecuting attorney and the California Supreme Court, the case against Moore rested entirely on the jury's perception of Terry Avery, the immunized accomplice who was the prosecution's key witness. The district attorney conceded during closing argument to the jury, "Terry Elaine Avery [is] the key to this case because she's the key to the special circumstances, who was present, who was there and actively committed the crimes, no question." On appeal, the state supreme court concurred, opening its discussion of the guilt phase evidence by remarking "The case against defendant was based almost entirely on the testimony of Terry Avery, who was granted immunity from prosecution in exchange for her testimony." *Moore*, 47 Cal.3d at 71.

As to the dispute over closing argument, Moore's initial disagreement with Slick arose when Slick refused to present any evidence or argument at all. After further discussion, however, Slick acquiesced. When Moore withdrew his request to discharge Slick, Moore clearly stated that he was doing so based on his understanding that Slick

had promised to point out, during closing argument, the inconsistencies in Avery's testimony.

After the prosecution had delivered a substantial portion of its opening argument, Moore and Slick again discussed the substance of the defense closing. The relationship again began to falter. Because the essence of the defense was that Moore was not present, Slick proposed focusing on the inconsistencies in Avery's testimony relating to whether Moore was, or could have been, present. While Moore agreed that Slick's focus was valid and one which he wanted highlighted to the jury, Moore felt that the challenge to Avery should be much more broadly based -- to wit, that Avery was an entirely unreliable witness.

Moore wanted the jury to be reminded that not only was Avery's testimony inconsistent with the physical evidence and conflicting as to Moore's presence, but that Avery's testimony was inconsistent in many other respects as well. One of the most significant arguments raised by Moore related to the prosecution's emphasis during summation on Avery's testimony that she had "turned herself in." Moore wanted the jury reminded, however, that law enforcement testimony clearly indicated that Avery had in fact been turned in involuntary by her mother.

Throughout its colloquy with Moore, the trial judge repeatedly confirmed that Moore's proposed arguments were legitimate, but expressed confidence that those arguments would likely be presented by Slick. Each time, Moore confirmed that Slick did not intend to make the arguments that Moore was proposing. In case Moore was not sufficiently clear, Slick removed any residual doubt: "There are some inconsistencies Mr. Moore just mentioned that I do not intend to argue. . . . [¶] I don't want to distract this jury by talking about things that I don't feel are germane to his guilt or innocence of the special circumstances and I'll not do so."[49/]

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49. It is not disputed that "appointed counsel, and not his client, is in charge of the choice of trial tactics and the theory of defense." *United*

This was no small dispute. In a case decided only months before the events at issue, the Supreme Court affirmed that

> The Counsel Clause itself, which permits the accused "to have the Assistance of Counsel for his defense," implies a right in the defendant to conduct his own defense, with *assistance* at what, after all, is his, not counsel's trial.

McKaskle, 465 U.S. at 174 (emphasis original).

Moore echoed these concerns in arguing to the trial judge:

> [I]f Ron Slick is wrong in his arguments, his arguments don't prove to be successful to the jury, he's not going on death row, I am. He's not going to get a life sentence, I am. It is my life I am fighting for.

Moore's request to proceed *pro se* for closing arguments cannot be derided as involving only an insubstantial part of the trial. As the Supreme Court observed in a case decided the same day as *Faretta*, "[t]here can be no doubt that closing argument for the defense is a

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States v. *Wadsworth*, 830 F.2d 1500, 1509 (9th Cir. 1987) (citing *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965)). Contrary to the Attorney General's suggestion, however, the issue here is not whether Slick's choice of topics for argument was within the realm of professionally reasonable judgment. The instant claim does not charge that Slick's closing argument was itself constitutionally deficient. *Cf. Wade* v. *Calderon*, 29 F.3d 1312, 1324-25 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 923 (1995). Nor does Moore argue that he had a right to control the topics addressed by trial counsel during closing argument. Rather, he argues, that Slick's proposed argument was "not the defense guaranteed him by the Constitution, for . . . it was not his defense." *Faretta*, 422 U.S. at 821. Moore felt so strongly about this that he was willing to waive his right to counsel and represent himself for the remainder of the trial.

basic element of the adversary fact-finding process in a criminal trial." *Herring* v. *New York*, 422 U S. 853, 858 (1975).

The other relevant factors also favored Moore. The timing of Moore's motion was justified since it was prompted by information that he learned during the middle of trial and reasonably could not have known prior thereto. Furthermore, all indications in the record suggest that Moore was a cooperative and respectful litigant. Allowing him to represent himself beginning with closing argument would not have created any disruption. Nor would granting the request have caused inconvenience, delay, or interfered with the flow of the trial. Moore clearly enunciated the topics he wanted to cover in closing arguments and confirmed that he was ready to proceed forthwith.

At least in the context of this case, where Moore himself had actually taken the stand and testified and was subjected to cross-examination, allowing Moore to deliver closing argument would have resulted in no more jury confusion than would any other case involving a *pro se* litigant. Indeed, probably less so. When the trial judge cautioned Moore that he would not be allowed to present additional evidence during closing argument and would be limited to the evidence in the record, Moore expressly acknowledged this limitation, identified the topics he proposed to argue, and clearly explained how those matters were already established in the record.

The trial judge failed to consider the factors that it was required to rely upon in guiding its discretion. Had it considered those factors, it would have been compelled to conclude that Moore's request should be granted.

D. Conclusion

The error in denying Moore the right to represent himself beginning at defense closing argument was reversible *per se*. *See supra* Section V(E).

ORDER

IT IS HEREBY ORDERED that Petitioner's motion for summary judgment be, and hereby is, **GRANTED** as to Claims A and C; to wit, Petitioner's motions to proceed pro se prior to jury empanelment, and prior to closing argument, respectively.

IT IS FURTHER ORDERED that Petitioner's motion for summary adjudication be, and hereby is, **DENIED**, and the following issues are hereby summarily adjudicated on the Court's own motion:

(1) Moore's exclusion from the March 5 and March 9 hearings did not deprive him of due process,

(2) The trial court conducted a sufficient inquiry on Moore's motion for substitution of counsel,

(3) The trial court did not prejudicially err in denying Moore's motion for second counsel, and

(4) Moore's claim that the trial court unconstitutionally denied him co-counsel status or appointment of advisory counsel is barred under the retroactivity doctrine of *Teaque* v. *Lane*, 489 U.S. 288 (1989) (plurality).

IT IS FURTHER ORDERED that Petitioner's motion for summary judgment be, and hereby is, **DENIED** as to Claim B; to wit, that the trial court improperly denied his motion for substitution of counsel.

IT IS FURTHER ORDERED that Respondent's motion for summary judgment be, and hereby is, **DENIED** as moot.

IT IS FURTHER ORDERED that Moore's petition for writ of habeas corpus be, and hereby is,

GRANTED and that the judgment of conviction and sentence of death in this case be **VACATED AND SET ASIDE**, as are any proceedings related to carrying out that judgment. Respondent shall release Moore from custody after the expiration of 60 days unless, within 60 days hereof, the State of California grants Moore the right to a new trial on all guilt, special circumstance, and penalty issues in accordance with applicable California law and the United States Constitution. 28 U.S.C. § 2243.

IT IS FURTHER ORDERED that the Clerk of this Court shall immediately notify the Warden of San Quentin Prison of this Court's ruling.

IT IS SO ORDERED.

Dated: March 31, 1995.

/s/

DAVID V. KENYON
United States
District Judge